Office Supreme Court U. S.
FILED,
JAN - 7 1891
JAMES H. MCKENNEY

Supreme Court of the United States.

OCTOBER TERM, 1890.

No. 138.

J. C. ANDERSON, Administrator of EDWARD J. WILSON, Deceased, THOMAS EMMET WILSON, SARAH J. DAVIS, and GEORGE W. DAVIS,
Appellants,

vs.

JAMES S. WATT, Executor of JAMES SYMINGTON, Deceased, Appellee.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF FLORIDA.

BRIEF FOR APPELLANTS.

J. HUBLEY ASHTON,
Counsel for Appellants.

McGILL & WALLACE
PRINTERS,
1107 E STREET N. W.

Supreme Court of the United States.

October Term, 1890. No. 138.

J. C. ANDERSON, ADMINISTRATOR OF EDWARD J. WILSON, DECEASED, THOMAS EMMET WILSON, SARAH J. DAVIS, AND GEORGE W. DAVIS, APPELLANTS,

vs.

JAMES S. WATT, EXECUTOR OF JAMES SYMINGTON, DECEASED.

Appeal from the Circuit Court of the United States for the Northern District of Florida.

Brief for the Appellants.

STATEMENT OF THE CASE.

This is an appeal by J. C. Anderson, administrator of Edward J. Wilson, deceased, Thomas E. Wilson, Sarah J. Davis and George W. Davis, from the decrees of the Court below in a suit instituted by Gustavus W. Faber and James S. Watt, as executors of James Symington, deceased, to foreclose a mortgage executed by Edward J. Wilson, of the city of New York, to James Symington, of that city, August 28, 1875, upon a tract of land, containing one hundred and sixty acres, more or less, in Orange County, Florida.

The suit was begun, on August 25, 1885, by a bill filed by Gustavus W. Faber and James S. Watt, described as "both of the city and State of New York and citizens of the State of New York," executors of the last will and testament of James Symington, deceased, against J. C. Anderson "of Orland County, Florida, a citizen of the State of Florida," administrator of Edward J. Wilson, deceased, and against Thomas Emmet Wilson, and Sarah J. Davies (Davis) described as "both of Sylvan Lake, Orange County, Florida, citizens of the State of Florida."

The bill alleges that Edward J. Wilson, being seized and in the actual possession of certain land in Orange County, Florida (designated in the survey of public lands as the S. W. $\frac{1}{4}$ of section 30, T. 19, S. of R. 30, E.), and being indebted to one James Symington in the sum of $13,000, as evidenced by a certain bond, dated February 1, 1875, payable one year from date, executed to James Symington, on August 28, 1875, a mortgage upon the property to secure the payment of the bond that Edward J. Wilson afterwards died leaving the principal and interest of the bond unpaid; that the defendant, J. C. Anderson, was appointed administrator of his estate by the County Court of Orange County, Florida; that Symington, who died in the State of New York, where he was domiciled, in 1877, left a will, appointing the complainants executors thereof, and they are now administering his estate under the same; and that the defendants, Thomas Emmet Wilson and Sarah J. Davies (Davis), are in the actual possession of the mortaged premises, claiming to have some interest therein or some part thereof as purchaser, mortgagee, or otherwise, but that their claims, whatever they may be, accrued subsequently to the lien created by the mortgage sought to be enforced, and are subject thereto; and that the principal and interest of the debt so sought to be secured to Symington, is due and unpaid, and complain-

ants are entitled to the aid of the Court in collecting the same by foreclosure of the mortgage and a sale of the property to satisfy the lien created thereby.

The bill prays for an account; that the alleged lien be enforced by a sale of the property; and that defendants, and all other persons, having any liens or claims, subsequent to the said mortgage, upon the property, be barred and foreclosed of all equity of redemption in the same. (Bill, Rec., pp. 1-3.)

The mortgage was given as "additional security" for a debt previously secured by a mortgage on property in White Plains, New York.

On December 7, 1885, the defendants, J. C. Anderson, administrator, and Thomas E. Wilson, filed a demurrer to the bill. (Rec. p. 9.)

On the same day, the defendant, Sarah J. Davis, filed a *plea* to the whole bill, averring:

1st. That the complainants were not, at the time of the filing of the bill, as alleged, the executors administering the estate of James Symington, but that previous to that time, to wit, on or about May 4, 1884, they were discharged by order of the Surrogate Court for the County of New York, State of New York, as such executors, and had ceased thereafter to have or exercise any right or authority as executors of the last will of the said Symington.

2d. That the defendant, Sarah J. Davis, before, and at the time of the filing of the said bill, was, and now is, under the coverture of one George W. Davis, who is still living, to wit, in the City and State of New York.

The plea prays the judgment of the Court whether she should be compelled to make any other or further answer to the bill, and to be hence dismissed with her costs, etc.

This plea is sworn to by Mrs. Davis. (Plea of Sarah J. Davis, Rec., p. 10.)

On December 26, 1885, the foregoing plea of Sarah J. Davis, and the demurrer of J. C. Anderson and Thomas E. Wilson, were *severally set down for hearing* on December 31, 1885, by the solicitors for the complainants. (Rec., p. 11, fol. 20.)

On February 11, 1886, the demurrer of J. C. Anderson and Thomas E. Wilson was overruled. (Order on the demurrer, Rec., pp. 11, 12, fol. 21.)

No issue was taken by the complainants on the plea of the defendant, Sarah J. Davis, but the plea was set down by them for argument, as above stated, and the complainants thus admitted the truth of the facts averred in it.

The record shows no order or decision of the Court upon the plea of Mrs. Davis.

On March 15, 1886, the defendants, J. C. Anderson, administrator of Edward J. Wilson, and Thomas Emmet Wilson, filed their answer to the bill. (Answer, Rec., pp. 19–27.)

The material facts averred in the answer appear to be these:

The tract of land embraced by the mortgage in suit is situated about six miles west of the town of Sandford, on Sylvan Lake, Orange County, Florida, and contains between 142 and 143 acres.

It is, and has been since the fall of 1879, in the possession of the defendant, Sarah J. Davis, wife of George W. Davis, of the city of New York, to whom it was sold on October 13, 1879, by the defendant, Thomas E. Wilson, for the consideration of $8,000.

On that day the property was conveyed by Thomas E. Wilson to Mrs. Davis, who paid him in cash the sum of

$2,000, and gave him a purchase-money mortgage for $6,000, in which her husband joined. (Rec., p. 23, fol. 47.)

Mrs. Davis immediately went into the actual possession of the land, and has continued in such possession from that time to the present without interference or interruption from any source relating to her title thereto until the filing of the present bill, and without knowledge that James Symington or his representatives claimed that the land was liable for any sum due them, until January 1, 1884. (*Ib.*, p. 24.)

On May 22, 1871, Edward J. Wilson, residing in the city of New York, who had bought the land from one C. E. Earnest, a homesteader, conveyed for a valuable consideration, to the defendant, Thomas E. Wilson, his nephew, an undivided moiety or one-half part of the property, by deed, recorded September 11, 1875.

Thomas E. Wilson went into the immediate possession of the premises under his deed, and from May 22, 1871, to the present time he and his grantee have been in the undisturbed and adverse possession of the property. (*Ib.*, p. 20.)

The mortgage by Edward J. Wilson to James Symington, executed August 28, 1875, embraced not only the undivided half interest that belonged to Edward J. Wilson, but also the undivided half interest of the defendant, Thomas E. Wilson, and was given without any authority from Thomas E. Wilson, and without his knowledge or consent. (*Ib.*, 21, fol. 42.)

The mortgage was not recorded within six months from the execution thereof and not until May 3, 1876; and Thomas E. Wilson had no notice of the giving of the mortgage, and did not know of the same until after he had recorded his said deed from Edward J. Wilson. (*Ib.*, p. 25, fol. 50.)

The interest of Edward J. Wilson in the property was subject to and liable for the advances made for the

benefit of the joint property by Thomas E. Wilson, as stated; and James Symington had notice of the rights of the latter from his long, notorious and sole possession of the land. (*Ib.*, 22, fol. 44.)

Edward J. Wilson died in New York in April, 1876.

The taxes upon the undivided half interest belonging to his estate, were not paid for the years 1876 and 1877; and on January 8, 1878, the property was sold for such taxes, and was purchased at the sale by the defendant, Thomas E. Wilson, who, on January 16, 1879, received a deed of *said undivided half interest* of the S. W. ¼ of sec. 30, T. 19, S. of R. 30 E., from the County Clerk of Orange County, Florida, in accordance with the laws of the State. (*Ib.*, p. 22, fols. 44–45.)

The defendants aver and claim that their long and continuous actual possession of the premises by virtue of the tax deed, without interruption, suit, or effort made to redeem the property or set aside the deed, has given them an absolute title to the undivided half of the property, conveyed by that deed to Thomas E. Wilson, relieved from all liens or encumbrances, and any liability for the mortgage sued on in this case. (*Ib.*, p. 23; p. 25, fol. 50.)

Mrs. Davis has expended in improvements upon the property over $20,000. (*Ib.*, p. 24.)

On January 30, 1884, she and her husband, George W. Davis, mortgaged the property to D. Appleton & Co. of New York, for $15,000, to secure a debt of her husband, and the mortgage was recorded February 12, 1884. (*Ib.*, p. 24, fol. 48.)

The defendant, Thomas E. Wilson, on December 31, 1883, and June 1, 1884, assigned interests in his said purchase-money mortgage to Mary F. Wilson for moneys loaned by her to him; and the assignments were duly recorded January 3, 1884, and June 8, 1884, respectively. (*Ib.*)

On May 3, 1886, an answer, sworn to by the defendant, Sarah J. Davis, and described as "*the answer of Sarah J. Davis and George W. Davis, her husband, two of the defendants to the bill of complaint exhibited against them by complainants,*" was filed in the case. (Answer, Rec., pp. 28–35.)

The circumstances under which Mrs. Davis purchased the property, are stated, in the answer, substantially as follows:

In the winter of 1878 and spring of 1879, Mr. and Mrs. Davis were residing in the city of New York, where they had been residing for some years.

The health of Mrs. Davis not being good, they concluded that if the climate of Florida proved beneficial to her, they would find it profitable to purchase an orange grove, which Mrs. Davis could take care of and manage, except in the summer months, while Mr. Davis remained at his business in New York, Mrs. Davis spending the summer with him there.

She accordingly visited Florida in September, 1879, and concluded to purchase this property, which was in the possession of, and under cultivation by, Thomas E. Wilson, if her husband approved.

She went with Mr. Wilson to New York to conclude the bargain, and the purchase met the approval of her husband.

From the deeds produced by Mr. Wilson he seemed to have a complete title to the property, and they determined that they might safely purchase it, and accordingly Mrs. Davis did purchase the same, and on October 13, 1879, in New York, took a deed therefor from Mr. Wilson for the consideration of $8,000, paying him $2,000 in cash, and giving him a mortgage for $6,000, in which her husband joined. (Rec., pp. 28, 29; Deed, *Ib.*, p. 41; Mortgage, *Ib.*, p. 42.)

After purchasing the property she remained about a

month in New York, when she returned to Florida, and went into possession of the property.

Finding the orange grove and the lake on the *north* side of the tract, she continued to improve that half of the property; and all her improvements are on the *north half of the quarter section.* She has about thirty acres in fruit trees, and fifteen acres more under cultivation. Among the improvements is one of the finest houses in the county. (*Ib.*, p. 32.)

She expended from the time she bought the property to January, 1884, over $20,000 upon it; and since that date she has expended in taking care of the improvements over $3,000 in excess of the income from it.

The answer claims the benefit of the purchase of the undivided one-half interest in the land that belonged to Edward J. Wilson at the tax sale referred to, on January 8, 1878, as fully as if Sarah J. Davis had purchased at the sale instead of Thomas E. Wilson, and the benefit of the tax deed made to him on January 16, 1879, and of his adverse possession under said deed as fully as if she had been the grantee therein and in possession of the property; and it is claimed that the adverse possession of Mrs. Davis, since October 13, 1879, founding her title to an undivided half interest in the property upon the said tax deed, etc., has given her an absolute title thereto, relieved of all encumbrances and liens previously existing against the property, the State tax constituting a lien prior to all others, and a sale under the same conveying a clear title. (*Ib.*, p. 33, fol. 66.)

Replications were filed, and the proofs of the defendants were taken in August, 1886. (Exhibits in Evidence, Rec., pp. 36–48; Testimony, *ib.*, 50–68.)

On December 20, 1886, the Court ordered that the bill be amended by striking out from the address the words, "Gustavus W. Faber and James S. Watt, both of the city

and State of New York, and citizens of the State of New York," and inserting therein as follows: "Gustavus W. Faber, of the city and State of New York, and James S. Watt, a subject of the Kingdom of Great Britain, temporarily residing in the city of New York."

And it was further ordered, "that this cause proceed in the name of the said James S. Watt, sole surviving executor of James Symington, deceased, and that it be discontinued as to said Gustavus W. Faber, suing as co-executor." (Rec., pp. 68, 69.)

On January 19, 1887, the Court below, by the District Judge, entered a decree of sale, adjudging as follows:

First. That the defendant, Anderson, as administrator of Edward J. Wilson, is indebted to complainant, James S. Watt, as sole acting executor of the will of James Symington, in the sum of $13,000 principal, and $10,887.13 interest, in all $23,887.13, and that complainant holds a mortgage lien to secure the same upon *an undivided one-half interest* in the land described in the mortgage sued on.

Second. That such lien be enforced by a sale of the said undivided one-half interest on the first Monday in March, 1887, unless said sum be paid to complainant before said day of sale.

Third. That John S. Driggs be, and is hereby, appointed Master *pro hac vice*, to advertise, conduct and make such sale, having first given 30 days' notice of the time, place and terms of sale, in some newspaper published in Orange County, Florida.

Fourth. That the sale be for cash, but that complainant may bid to the extent of the sum adjudged to be due him.

Fifth. That said Master make report of his acts and doings herein, with all convenient speed, to this Court. (Decree, Rec., p. 78.)

On the 5th of March, 1887, two days before the day of sale, the District Judge, from Defuniac Springs, Florida, sent to the Clerk of the Circuit Court the following *telegram:*

"DEFUNIAC SPRINGS, FLORIDA, *March* 5 1887.
"PHILIP WALTER, *Clerk*,
"Jacksonville, Florida:
"Enter order *nunc pro tunc*, substituting Bird for Driggs, Master, in Watt *v.* Anderson.
"THOMAS SETTLE, *Judge.*"

It is stated in the transcript as follows:

"In compliance with the foregoing *telegram*, the following order is entered at rules this *March 7, 1887*, as of January 19, 1887:"

JAMES S. WATT, Executor, Etc.,
vs.
J. C. ANDERSON, Administrator, *et. al.*

In this cause it is *ordered, adjudged and decreed* as follows:

The original decree of sale entered herein January 19, 1887, in paragraph three thereof, be amended so that Wm. Capers Bird be and he is hereby substituted for John S. Driggs, therein appointed Master *pro hac vice*, to *advertise, conduct, and make* such sale." (Rec., p. 85.)

On March 7, 1887, the day appointed by the decree for the sale, William Capers Bird (who was the United States Marshal), purporting to be "Master *pro hac vice*," under the final decree, made what is called his report of sale as such Master, "in pursuance to the decrees rendered herein," as follows:

"In pursuance to the decrees rendered herein, I, William Capers Bird, as Master *pro hac vice*, do report as follows:

"1. That I gave thirty days' previous public notice, by advertisement in the Sandford Journal, a newspaper published daily at Sandford, in said County of Orange, and the publisher's certificate of advertisement, hereto attached, marked 'Exhibit A,' is hereby prayed to be taken as part hereof.

"2. That *this, the 7th day of March, 1887, the first Monday of said month*, during the legal hours of sale, before

the Court House door of said Court, at the said City of Jacksonville, I, at public outcry, did offer said land for sale to the highest bidder, for cash.

"3. That then and there the said complainant, James S. Watt, executor of James Symington, being the highest and best bidder, purchased said land at and for the sum of $3,000, said sum being the highest bid made." (Rec., p. 79.)

The defendants filed objections to the confirmation of the sale as above reported, as follows:

"*First.* That the decree directs the sale to be made by John S. Driggs, Esq., as Special Master.

"*Second.* That there is no order or decree authorizing or directing the Marshal (Wm. Capers Bird) to make the sale.

"*Third.* That the decree directs John S. Driggs, Esq., to advertise and sell the property, and the Marshal advertises and sells.

"*Fourth.* That the Marshal reports the sale of a one-half interest in the lands, which, if confirmed, without qualification, it is claimed, will authorize a deed to the purchaser of one-half of the *improvements*, which was not so intended by the Court." (Rec., p. 80.)

On April 12, 1887, the Court entered an order adjudging and decreeing that "*the report of said Master and the said sale are in all things confirmed.*" (Order, Rec., p. 81.)

By the same order, the final decree herein was so far modified as to allow the defendants to file a supersedeas bond herein by the time mentioned, and the defendants having in open court prayed an appeal to this Court, the appeal was granted, and the supersedeas bond was fixed, by the Court at five thousand dollars.

The supersedeas bond on the appeal from the decrees and orders rendered on January 19, 1887, and April 12, 1887, was approved and filed in the case. (Rec., p. 83.)

Proofs of the Defendants.

The testimony for defendants is included in pages *50–68*, and the several deeds, offered in evidence by them, are contained in pages *36–48*, of the record.

Thomas E. Wilson, in his testimony (pp. 50–59) states the circumstances under which he became the owner of an undivided moiety of the land embraced by the mortgage sued on, by deed from his uncle, Edward J. Wilson, dated May 22, 1871, offered in evidence, and the reasons why the deed was not recorded by him until September 11, 1875. (Deed, Edward J. Wilson to Thomas E. Wilson, May 22, 1871. Rec., p. 38.)

He states that he was in actual possession of the land at the time he received the deed; that he remained in possession till he sold it, in 1879; that he did not know the amount of the mortgage in suit, or the fact that it purported to cover the whole property until May, 1876; that his uncle died April 15, 1876; and that the mortgage was given without his knowledge or consent.

The deed from Earnest to E. J. Wilson was in his possession, and the United States patent for the land to E. J. Wilson, April 10, 1875, was delivered to him, and always remained in his possession.

He notified Symington, in the summer of 1876, of his interest in the property, and that he claimed the benefit of his advances.

He saw Symington in New York, in October, 1876, and came to an understanding with him about the property, but it was not carried out by Symington; he understood that something had been received from the prior security, and Symington did not intend to look to the Florida property; he returned to Florida, and from that time until November, 1883, he heard nothing from Symington or his representatives in regard to any claim upon the property by him or them.

He was informed by the representatives of the estate of E. J. Wilson that the estate was insolvent, and the heir and devisees declined to have anything to do with the property of his estate.

As to the subsequent purchase of the undivided half interest of Edward J. Wilson, he states as follows:

"Upon learning the condition of the estate of Edward J. Wilson, and that the heirs and devisees would have nothing to do with it, I returned the taxes upon my undivided interest in the property in my name for the year 1876 and paid them, and the other half interest was separately assessed. In the year 1877 I also returned my undivided interest, for taxes, and paid the taxes upon it, and did not pay upon the other part, and the other one-half interest was assessed separately. The undivided one-half interest of Edward J. Wilson was advertised for taxes in the year 1877, for the years 1876 and 1877, and on 8th of January, 1878, was sold for taxes by the collector of revenue for Orange county, Florida. I was present at the sale, and bid in the property. I received a certificate of the sale from the collector, and in January, 1879, I received a deed, executed January 16, 1879, to that undivided one-half interest. I paid the taxes on the whole property myself for the years 1878 and '9 as my property. I claimed it as my own individual property. The entire interest in the estate I claimed absolutely from that time until I sold it, and I was in actual possession of it from that time until I sold it, doing with it just as I saw fit in every respect." (Rec., p. 54; Tax Deed from the State of Florida to Thomas E. Wilson, January 16, 1879, offered in evidence, Rec., p. 40.)

Mr. Wilson testifies that he sold the land on October 13, 1879, to Sarah J. Davis, and conveyed to her the entire property by warranty deed for the consideration of $8,000; and of this she paid $2,000 in cash on the day the deed was delivered, and gave him a purchase-money mortgage for $6,000. (Deed, Thomas E. Wilson to Sarah J. Davis, Rec., p. 41; Mortgage, Sarah J. Davis and G.

W. Davis, her husband, of the city of New York, to Thomas E. Wilson, *ib.*, p. 41.)

He has assigned this mortgage as security for $4,000 borrowed from Mary F. Wilson, and the debt is still due.

Mrs. Davis, and her husband, subsequently mortgaged the property to Messrs. D. Appleton & Co., of New York, for $15,000. (Copy of Mortgage, January 30, 1884, George W. Davis, of the city of New York, and Sarah J. Davis, his wife, to D. Appleton & Co., offered in evidence, Rec., p. 46.)

Mr. Wilson states that from 1871 to the early part of 1876, the time of his uncle's death, he expended about $5,000 on the property, of which he had received about $2,000 from his uncle. To October, 1879, he had spent in addition about $3,000 from his own means in taking care of the place and buildings. (pp. 52, 59.)

He testifies as to the extent and character of the valuable improvements put upon the property by Mrs. Davis, his grantee, and that they are all on the *north half* of the land, with the exception of the fence, which encloses the whole property.

The improvements are on the *northeast quarter and the northwest quarter* of the southwest quarter of section 30, township 19, south, range 30 east. (Pp. 55, 56.)

Mrs. SARAH J. DAVIS, in her testimony, on behalf of the defendants (Rec. pp. 65–68), states that she purchased the property in September, 1875, in good faith, from Thomas E. Wilson, who was in possession, claiming it as his own, for $2,000 cash and $6,000 on mortgage, and that she has occupied it ever since she bought it, "except when I go North in the summer for a few months."

She has built upon the property a large three-story house, containing 13 rooms at a cost between $9,000 and $10,000, and a barn, and set out about 1,200 trees—orange trees and other fruit trees. In addition to the

cost of the dwelling house and barn, she has expended in the improvement of the property about $13,000. (Rec., pp. 66–67.)

Mrs. Davis states that the *improvements are "all on the north half (of the quarter section) except the fence, which has been put around the entire tract,"* and that she does not think there is any difference in the value of the north half and the south half of the entire tract in its *natural* condition. (*Ib.*, p. 67, fol. 135.)

She testifies that she first had information as to the Symington mortgage about the first of January, 1884. The house and barn had been built and the trees planted before that time. She states that her *husband is living in New York*, and is a party to this suit. (*Ib.*, p. 67, fol. 134.)

She has mortgaged the property to D. Appleton & Co. for $15,000.

G. B. Dickenson, a witness for defendants, testifies as to the location and character of the property, its possession and improvement by Thomas E. Wilson, and the improvements made by Mrs. Davis, which, he states, are "*on the north one-half of the one-fourth section, except the fence, which encloses the whole tract.*"

He thinks, upon careful examination, that the north and south halves of the quarter section, are both of the same value *naturally.*

During the time Thomas E. Wilson had the place, his expenditure probably was from $1,000 to $1,200 a year. (Rec., pp. 61–63.)

The following exhibits were offered and filed in evidence (Rec., pp. 36–43):

Exhibit A. Deed between Charles E. Earnest and wife and Edward J. Wilson, March 15, 1871.

Exhibit B. Deed between Edward J. Wilson and Thos. Emmet Wilson, May 22, 1871.

Exhibit C. Land patent from United States to Edward J. Wilson, April 10, 1875.

Exhibit D. Tax-sale deed from State of Florida to Thomas E. Wilson, January 16, 1879.

Exhibit E. Deed between Thos. Emmet Wilson and Sarah J. Davis, October 13, 1879.

Exhibit F. Deed between Sarah J. Davis and husband and Thomas Emmet Wilson, October 13, 1879.

Exhibit G. Deed between Thos. E. Wilson and Mary F. Wilson, June 1, 1884.

Exhibit H. Deed between Thos. Emmet Wilson and Mary F. Wilson, December 31, 1883.

Exhibit I. Deed between Geo. W. Davis and wife and Wm. H. Appleton *et al.*, January 30, 1884.

Exhibit K. Letter, Edw. to Emmet, March 17, 1879.

Assignment of Errors.

The Court below erred:

1. In entertaining jurisdiction of this case, and in not dismissing it for want of jurisdiction, as the record shows that the suit does not really and substantially involve a dispute or controversy within the jurisdiction of the Court below under the Constitution and laws of the United States.

2. In entertaining jurisdiction of this suit, and rendering the decree of sale therein passed January 19, 1887, as it appears in and by the record that the defendant, Sarah J. Davis, and George W. Davis, her husband, were not citizens of the State of Florida, and that neither of them was a citizen of that State, when the suit was commenced, and the presumption from the record is that they were citizens of the State of New York, when the bill was filed.

3. In making the order, passed December 20, 1886, purporting to amend the bill in the manner therein

directed, and in not dismissing the bill after that order. (Rec., p. 68.)

4. In not dismissing the bill upon the plea of Sarah J. Davis, filed December 7, 1885. (Rec., p. 10.)

5. In not dismissing the bill upon the ground that George W. Davis, her husband, was not joined with her as a defendant to the bill, and was an indispensable party to the suit.

6. In not dismissing the bill upon the ground that Mary F. Wilson and D. Appleton & Co. of New York were necessary parties to the suit, and were not made defendants to the bill.

7. In not dismissing the bill at the final hearing on the pleadings and proofs in the record.

8. In rendering the decree of foreclosure and sale of January 19, 1887, and in not dismissing the bill, as the adverse title to the property described in the mortgage sued on, claimed by the defendants and appellants, was not the proper subject of determination in this suit.

9. In adjudging, by said final decree, that complainant, James S. Watt, holds a mortgage lien to secure the indebtedness therein mentioned upon an undivided half interest in the lands therein described, and that such lien be enforced by a sale of said undivided one-half interest, as directed.

10. In not deciding that Sarah J. Davis had and acquired a good and valid title in fee to the undivided half interest in the property, purchased at the tax sale, on January 8, 1878, by Thomas E. Wilson, her grantor, under and by virtue of the tax-sale deed to him from the State of Florida, dated January 16, 1879, freed from the lien of the mortgage sued on in this case.

11. In not limiting and restricting the right of the complainants in the bill to a sale of the unimproved south half of said property for the satisfaction of the mortgage, or in not expressly declaring and providing in said decree that a sale of an undivided moiety of the property thereunder, was and should be without prejudice and subject to the claims, rights, and equities of Sarah J. Davis and George W. Davis in and in respect to the permanent improvements upon the said property, and other expenditures and advances of defendants in relation thereto.

12. In overruling, by the order and decree of April 12, 1887, the objections and exceptions filed by appellants to the confirmation of the sale reported by William Capers Bird, the Marshal, and in confirming the said sale by the said order and decree.

13. In confirming, and in not setting aside, the said sale, as the same was made without authority of law and was void.

14. In confirming, and in not setting aside, the said sale, as there was no decree or order of the Court below authorizing or empowering the said William Capers Bird to sell the property mentioned in the said final decree of January 19, 1887.

15. In confirming, and in not setting aside, the said sale, as the record does not show that the sale was advertised, and shows that if the sale was advertised, it was not advertised as directed by, or in compliance with, the said final decree of the Court.

16. In confirming, and in not setting aside, the said sale, as the record shows that the sale was not in conformity with the final decree of the Court.

Argument for the Appellants.

First.

It was error in the Circuit Court to assume jurisdiction in this suit, which should have been dismissed for want of jurisdiction; and the final decree rendered therein by that Court, therefore, should be now reversed by this Court.

1. The case presents no Federal question, and the jurisdiction of the Court below was invoked, by the bill, solely upon the ground that the complainants were citizens of New York, and the defendants citizens of Florida.

The fifth section of the Act of March 3, 1875, determining the jurisdiction of the Circuit Courts of the United States, provides that if in any suit commenced in one of such Courts "it shall appear to the satisfaction of said Circuit Court, at any time after such suit has been brought or removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said Circuit Court, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under this act, the said Circuit Court shall proceed no further therein, but shall dismiss the suit or remand it to the Court from which it was removed, as justice may require." (18 Stats., 472.)

This enactment modifies the old rule that an issue as to the fact of citizenship could only be made by a plea in abatement, when the pleadings properly averred the citizenship of the parties, and requires the Circuit Court, when the record discloses a controversy of which the Court cannot properly take cognizance, to proceed no further and dismiss the suit; "and its failure or refusal to

do what, under the law applicable to the facts proved, it ought to do, is an error which this Court, upon its own motion, will correct, when the case is brought here for review." (Morris *v.* Gilmer, 129 U. S., 325; Nashua Railroad *v.* Lowell Railroad, 136 U. S., 374; Farmington *v.* Pillsbury, 114 U. S., 144.)

Mr. Justice Harlan, speaking for the Court, in the leading case of *Morris* v. *Gilmer*, said:

"The rule is inflexible and without exception, as was said, upon full consideration, in *Mansfield, Coldwater, &c., Railway* v. *Swan* (111 U. S., 379, 382), 'which requires, this Court, of its own motion, to deny its own jurisdiction, and, in the exercise of its appellate power, that of all other Courts of the United States, in all cases where such jurisdiction does not *affirmatively* appear in the record on which, in the exercise of that power, it is called to act. On every writ of error or appeal, the first and fundamental question is that of jurisdiction, *first*, of this Court, and *then* of the Court from which the record comes. This question the Court is bound to ask and answer for itself, even when not otherwise suggested, and without regard to the relations of the parties to it.' To the same effect are *King Bridge Co.* v. *Ottoe County*, 120 U. S. 225; *Grace* v. *American Central Insurance Co.*, 109 U. S., 278, 283; *Blacklock* v. *Small*, 127 U. S., 96, 105, and other cases. These were cases in which the record did not affirmatively show the citizenship of the parties, the Circuit Court being without jurisdiction in either of them unless the parties were citizens of different States. But the above rule is equally applicable in a case in which the averment as to citizenship is sufficient, and such averment is shown, in some appropriate mode, to be untrue. While under the Judiciary Act of 1789, an issue as to the fact of citizenship could only be made by a plea in abatement, when the pleadings properly averred the citizenship of the parties, the Act of 1875 imposes upon the Circuit Court the duty of dismissing a suit, if it appears at any time after it is brought and before it is finally disposed of, that it does not really and substantially involve a controversy of which it may properly

take cognizance. *Williams* v. *Nottawa*, 104 U. S. 209; *Farmington* v. *Pillsbury*, 114 U. S., 138; *Little* v. *Giles*, 118 U. S. 602. * * * We have already seen that this Court must, upon its own motion, guard against any invasion of the jurisdiction of the Circuit Court of the United States as defined by law, where the want of jurisdiction appears from the record brought here on appeal or writ of error."

In the late case of *Nashua R. R.* v. *Lowell R. R.* (136 U. S., 374), Mr. Justice Field, after stating the principal object of the 5th section of the Act of March 3, 1875, in reference to the cases contemplated by it, said:

"In such cases it is undoubtedly the duty of the Court below, of its own motion, to deny its jurisdiction, and of this Court, on appeal or writ of error, to see that that jurisdiction has in no respect been *imposed upon*. *Morris* v. *Gilman*, 129 U. S., 315, 326; *Farmington* v. *Pillsbury*, 114 U. S., 138."

The Act of 1875 was intended to promote the ends of justice, and is equivalent to an express enactment by Congress that the Circuit Courts shall not have jurisdiction of suits which do not really involve a dispute or controversy of which they have cognizance; and it is the appropriate duty of this Court, in the exercise of its appellate jurisdiction, to take care that those Courts shall not use the judicial power of the United States in cases to which the Constitution and laws of the United States have not extended that power.

Indeed, as observed by Mr. Justice Miller, "this Court has uniformly acted upon the principle that in order to protect itself from collusive agreements between parties, who wish to litigate their controversies in the Federal Courts, it would, on its own motion, take the objection of the want of jurisdiction in the Circuit Court, *especially as regards citizenship*." (Cameron *v.* Hodges, 127 U. S., 325.)

According to the uniform decisions of this Court, "in cases where the jurisdiction depends upon the citizenship of the parties, such citizenship, or the facts which in legal intendment constitute it, should be distinctly and positively averred in the pleadings, or should appear *affirmatively and with equal distinctness* in other parts of the record." (Robertson *v.* Cease, 97 U. S., 646; Railway Co. *v.* Swan, 111 U. S., 382; Stevens *v.* Nichols, 130 U. S. 231.)

The particular States in which citizenship is claimed or asserted to exist must appear affirmatively and with distinctness upon the record; and the jurisdiction fails if it is consistent with the record that, when the suit was begun, one of the parties was not a citizen of any State of the Union, or that adverse parties were citizens of the same State. (Cameron *v.* Hodges, 127 U. S., 325; Metcalf *v.* Watertown, 128 U. S., 588; Railway Co. *v.* Swan, 111 U. S., 381.)

"This Court," said Mr. Justice Miller in *Cameron* v. *Hodges* (*supra*), "has always been very particular in requiring a distinct statement of the citizenship of the parties, and of the *particular States in which it is claimed.*"

In that case it was also said: "All the complainants might be residents and citizens of the District of Columbia, or of any Territory, and they might not be citizens of the State of Tennessee, where the suit was brought, or indeed of any State of the Union. A citizen of a Territory, or of the District of Columbia, can neither bring nor sustain a suit on the ground of citizenship in one of the Circuit Courts."

In *Metcalf* v. *Watertown* (*supra*), Mr. Justice Harlan said: "It nowhere appears in the record of *what State* the plaintiff's assignors were citizens, when this action was commenced; indeed, it is *consistent with the record* that they were, at that time, citizens of the same State with the defendant."

In *Railway Co.* v. *Swan* (*supra*), Mr. Justice Matthews

said: "The averment is, that he was not then a citizen of Ohio, and that his actual citizenship was unknown, except that he was a citizen of one of the States or Territories. It is consistent with this statement that he was not a citizen of any State. He may have been a citizen of a Territory, and if so, the requisite citizenship would not exist."

It is conclusively settled, also, that each co-plaintiff must be competent to sue and each co-defendant liable to be sued, in the Circuit Court, or the jurisdiction cannot be entertained (Strawbridge *v.* Curtiss, 3 Cr., 267; reaffirmed, Smith *v.* Lyon, 133 U. S., 319).

It is clear, therefore, that if it appears from the present record that the Court below had no jurisdiction of the controversy in this suit, the decree must be reversed, and the cause remanded, with direction to the Circuit Court to dismiss the bill.

2. An examination of the record discloses that Sarah J. Davis, the principal defendant in the case, was not, at the time the suit was commenced, or afterwards, a citizen of Florida, and that the averment in the bill as to her citizenship is untrue; and it is consistent with the record that she was a citizen of New York.

It has been seen that, on December 7, 1885, Mrs. Davis interposed, under oath, a special plea to the bill, in which she stated that "before and at the time of the filing of the bill, she was, and now is, under the coverture of one George W. Davis, who is still living, to wit, in the city and State of New York." (Rec., p. 10.)

No replication was filed to the plea, but it was set down for argument by the complainants, who thus conclusively admitted the truth of the facts averred in the plea.

The facts thus set forth are sufficient to negative, in

point of law, the allegation of the citizenship of Mrs. Davis in the bill.

The plea may properly be treated as an averment that before, and at the time of, the filing of the bill, and when the plea was interposed, George W. Davis, the husband of the defendant, resided in the city and State of New York, where the evidence shows he resided, at the time the property was purchased, and after the institution of the suit.

Upon this view, the plea shows that Mrs. Davis was not a citizen of Florida at the commencement of the suit.

It is a well-settled principle of jurisprudence that a wife's domicile and citizenship follows that of her husband; and it could not be maintained that an undivorced wife can become a citizen of a State different from that of which her husband is a member, and liable to be sued as such in a Court of the United States.

Mrs. Davis could not be a citizen of Florida, without an *actual domicile* in that State, which she could not acquire, independently of the act and intention of her husband, while the matrimonial relation continued unbroken. (Morris *v.* Gilmer, 129 U. S., 326; 2 Bishop, Mar. & Div., sec. 125).

The plea, therefore, by its just effect, negatives the allegation in the bill as to Mrs. Davis' citizenship.

The other portions of the record also show that that allegation is untrue.

As said, no issue was raised on the plea of coverture, and an answer was put in by Mrs. Davis' solicitors in her name and that of her husband, though no steps were taken to make Mr. Davis, by proper amendment of the bill, an actual defendant to the suit. Complainants no doubt purposely forbore from any attempt to make him a party, by amendment, as they could not allege that he was a citizen of Florida, and must have believed and known that he was a citizen of New York.

The answer of Mrs. Davis shows that when the property in Florida was purchased she was residing with her husband in New York "*where they had been residing for some years,*" and where he was in business, and that the purchase was made primarily with reference to the health of Mrs. Davis, which was not good, in New York, and that *she* was to take care of and manage the property, "*while George W. Davis remained at his business in New York,*" Mrs. Davis "*spending the summer with him there.*" (Answer, Rec., p. 28.)

The answer further shows that after the purchase, consummated with the approval of Mr. Davis, in New York, in October, 1879, Mrs. Davis remained about a month in New York, when she went to Florida, and took actual possession of the property herself; and the proofs show that she continued personally in occupation of it from that time forward, and negative all idea that her husband ever had anything personally to do with its management, or ever lived in Florida.

All the witnesses testify that it was Mrs. Davis who was in occupation of the land, and who improved and cultivated it from the time she went upon the property, in accordance with the understanding mentioned between her and her husband. (Thomas E. Wilson, Rec., p. 55; Dickenson, *Ib.*, p. 61; S. J. Davis, *Ib.*, p. 66.)

There is no uncertainty upon this subject in the testimony.

Nobody speaks of Mr. Davis as having ever had anything to do with the actual management of the property in Florida, or as residing in Florida.

Mrs. Davis was examined as a witness a year or more after the bill was filed, and she stated that her husband was *living in New York*, and was a party to the suit, and that she had occupied the property ever since the purchase, except when she went "*North in the summer for a few months.*" (Rec., pp. 66, 67.)

The testimony is literally as follows:

Q. Do you know a tract of land described as the southwest quarter of sec. 30, T. 19, S. R. 30, E.?

A. Yes, sir, I do. It is the property I live on.

I purchased it from Mr. Thomas Emmet Wilson, and paid him $8,000—$2,000 in cash and $6,000 on mortgage. I took possession, I think, about the month of October, 1879. My purchase was made in September next preceding. I have occupied the premises ever since I purchased, *except when I go North in the summer for a few months.*

Q. Is your husband living, and is he or not a party to this suit?

A. *He is living in New York;* he is a party to this suit.

The fact also appears that about a year and six months before the bill was filed, Mrs. Davis joined with her husband in a mortgage of the property to Messrs. Appleton & Co., of New York, to secure a debt of Mr. Davis, who is described in the mortgage as of the city of New York, and who acknowledged the instrument on February 4, 1884, in that city. (Rec., pp. 46–49.)

The just conclusion from the whole record is that Mr. and Mrs. Davis were domiciled in New York, and not in Florida, before and at the time of and after the institution of this suit.

Where a man lives is taken *prima facie* to be his domicile, until the facts establish the contrary, and when a person has resided in a State for a considerable time, being in business there, he may be presumed to be a citizen of such State, unless the contrary appears. (Ennis *v.* Smith, 14 How., 400; Shelton *v.* Tiffin, 6 How., 185.)

In legal contemplation, the domicile of the husband is the domicile of the wife, although she may be actually residing in another place. (Story, Conflict of Laws, sec. 46; 2 Bishop, Marriage and Divorce, sec. 125; Greene *v.*

Greene, 11 Pick., 410; Harteau *v.* Harteau, 14 Pick., 185; Hairston *v.* Hairston, 27 Miss., 704; Harrison *v.* Harrison, 20 Ala., 643.)

The residence of Mr. Davis in New York from 1878 to and including the time when the testimony was taken in this suit, determined the legal residence and domicile of his wife, who in contemplation of law was a mere sojourner in Florida when the suit was brought.

In point of fact, as appears by the answer, Mrs. Davis went to Florida with special reference to her health, and her testimony that she had occupied this property ever since she purchased it, except when she went "North in the summer for a few months," shows that the domestic arrangement, mentioned in the answer, in reference to her sojourn, in Florida, and her care and management of the property, was carried out by Mr. and Mrs. Davis.

The pleadings and proofs in the record thus negative the allegation in the bill as to the citizenship of Sarah J. Davis, and show that she and her husband were *not* citizens of Florida when the suit was commenced; and it is, moreover, consistent with the record, and may be presumed, that they were citizens of the State of New York.

3. The appellee here can derive no advantage from the extraordinary order of the Court below, made on December 20, 1886, four months after the proofs had been taken and reported by the Master, by which the original averment as to the citizenship of the complainants, Gustavus W. Faber and James S. Watt, executors, was stricken out from the bill as filed, and a new and different averment inserted in the bill, as follows: "Gustavus W. Faber of the city and State of New York, and a citizen of the State of New York, and James S. Watt, *a subject of the Kingdom of Great Britain*, temporarily residing in the city of New York;" and the cause was directed to proceed in

the name of James S. Watt, sole surviving executor of James Symington, and be discontinued as to Gustavus W. Faber. (Rec., pp. 68, 69.)

It is manifest that this order, changing the description of the character of Watt, as complainant, purported to make a *new case* different from that presented by the bill as framed and filed, and was illegal and invalid. (Shields *v.* Barrow, 17 How., 144.)

The principle is settled that the jurisdiction of the Circuit Court depends on the condition of the parties at the commencement of the suit, and no subsequent change can give or take it away. (Mollan *v.* Torrance, 9 Wh., 539; Dunn *v.* Clarke, 8 Pet., 7; Conolly *v.* Taylor, 2 Pet., 556.)

The jurisdiction of the Court, so far as depending on the condition of Watt, must be governed by that condition, as it was at the commencement of the case, according to the averment in the bill.

If the Court below had no jurisdiction by reason of the citizenship of the parties, Watt could not give it jurisdiction by showing that the averment in the bill as to his citizenship was in fact untrue, or by becoming an alien after the commencement of the suit.

He could not inject a new controversy into the bill after the case was at issue and the testimony taken.

If the object of the so-called amendment of the bill was to attempt to make a new case for the jurisdiction of the Court between Watt, as an alleged alien, and Mr. and Mrs. Davis as citizens of New York, and not citizens of Florida, the object failed of accomplishment, as the record does not show affirmatively their citizenship, though it conclusively appears, as, in effect, admitted by Watt, that they were not citizens of Florida, when the suit was commenced.

This so-called amendment is, in fact, a conclusive admission that the Court had no jurisdiction of the case made in the bill, on the ground of the citizenship of the parties.

4. If the alteration of the bill, by the order of December 20, 1886, can be treated as a valid amendment, the jurisdiction nevertheless fails, as there is no evidence in the record that Watt, when the suit was commenced, was an alien, and it is, moreover, consistent with the record that he was a citizen of New York, as averred, when the bill was filed. It appears that he is described in the will of Symington, dated March 27, 1875, as a merchant of Brooklyn, Long Island, and similarly in the grant of letters-testamentary, on October 29, 1877. (Rec., pp. 14, 17.)

And as already observed, the record does not show affirmatively the citizenship of Mrs. Davis, and her husband, conformably to the decisions of this Court, above cited, though it does show that they were not citizens of Florida.

5. It is manifest that this suit is one which is within the condemnation of the prohibition of the Act of 1875, and ought not to have been entertained by the Court below, and that its decrees were without warrant of any jurisdiction, and should be set aside by this Court.

The case is plainly an attempted invasion of, and imposition upon, the jurisdiction of the Circuit Court as defined by law.

Mr. Davis was a necessary party to the bill, and if he had been made a party upon the record, as he should have been, complainants would have been compelled at once to disclose the fact that the Court never had any right to entertain the suit.

When, moreover, they altered the bill by describing the complainant, James S. Watt, as an alien, and not a citizen of New York, they *confessed* upon the *record* that there never was such a case or controversy as they had represented in the bill, and the Court below thereupon,

and at once, should have dismissed the suit under the mandate of the act of 1875.

It was, therefore, a grave mistake for that Court to assume to make any decree affecting the rights of the defendants and appellants.

It is accordingly submitted that the final decree should be reversed, with costs to appellants, in this Court, and the Court below should be directed to dismiss the suit with costs in that court.

Second.

The decree of sale of January 19, 1887, is erroneous, in any view of the case, because George W. Davis, husband of Sarah J. Davis, was an indispensable party to the bill to foreclose the mortgage; and on that ground the bill should have been dismissed.

1. Mr. Davis was not a party to the bill as filed, and no appearance was entered for him on the return of the subpœna. (Rec., p. 8.)

The record does not show any order of the Court overruling the plea of coverture filed by Mrs. Davis. (*Ib.*, p. 11.) Nor does it show that Mr. Davis was afterwards made a party to the suit, by amendment of the bill.

The answer was signed by Fleming & Daniel, "*Def'ts Sol's*," and sworn to by Mrs. Davis, but it was not signed or sworn to by Mr. Davis. (*Ib.*, p. 34.)

Under the procedure in the Federal courts on the equity side, which is governed by the rules of this Court, and where they are inapplicable by the practice of the High Court of Chancery in England, it is well settled that in a suit against a married woman, by a third person, her husband must be joined with her as a codefendant, and that her non-joinder is a sufficient cause for dismissal of the bill. (U. S. *v.* Pratt C. & C. Co., 18 Fed. R., 709; Douglass *v.* Butler, 6 Fed. R., 228; Taylor *v.* Holmes, 14 Fed. R., 514; O'Hara *v.* McConnell, 93 U. S., 152.)

Such is the rule in the English Chancery, where the husband is regarded as the substantial party to the suit, and the wife cannot answer separately without a previous order of the Court for that purpose founded upon special circumstances. (1 Daniell's Ch. Pl. & Pr., 482; Story Eq. Pl., sec. 71; Ferguson *v.* Smith, 2 John. Ch. R., 139.)

In Florida, it is believed that it is settled law that a married woman can neither sue nor be sued at law or in equity, without the joinder of her husband, except in special cases. (Lignoski *v.* Bruce, 8 Fla., 269; Coffee *v.* Groover, 20 Fla., 64; Smith *v.* Smith, 18 Fla., 789; Dzialinski *v.* Bank of Jacksonville, 23 Fla., 346.)

2. This property is the separate statutory property of Sarah J. Davis, and her husband had a beneficial interest in it, and was entitled to the current use and proceeds of the land received during coverture, without obligation to account to her therefor; nor could Mrs. Davis dispose of, or encumber it, without her husband joining in the deed. (McGill *v.* McGill, 19 Fla., 341; Staley *v.* Hamilton, *ib.*, 275; Carn *v.* Haisley, 22 Fla., 317.)

The provisions of the statute law of Florida on this subject are as follows:

SEC. 5. Any married woman having separate and independent title to property, under and by virtue of Sections 3 and 4 of this chapter, shall not be entitled to sue her husband for the rent, hire, issues, proceeds, or profits of said property, nor shall the husband charge for his management and care of the property of his wife.

SEC. 6. The husband and wife shall join in all sales, transfers, and conveyances of the property of the wife, and the real estate of the wife shall only be conveyed by the joint deed of the husband and wife, duly attested, authenticated and admitted to record, according to the laws of Florida regulating conveyances of real property. (McClelland's Digest, Laws of Fla., chap. 150, p. 784.)

Mr. and Mrs. Davis, therefore, were both necessary parties to any bill to extinguish their rights in the property,

and no valid decree of sale could be made without their presence in the case as defendants to the bill. (Jones on Mortgages, sec. 1394; Barbour on Parties, 502; Terrill *v.* Allison, 21 Wall., 293; Hagan *v.* Walker, 14 How., 38; C. & V. R. R. Co. *v.* Fosdick, 106 U. S., 68; McArthur *v.* Scott, 113 U. S., 341; Barlack *v.* Halle, 22 Fla., 236.)

Third.

Mary F. Wilson, and D. Appleton & Co., of New York, also, were, in any view of the case, necessary parties to the bill, and no valid decree could be made in their absence.

1. The bill prays that all persons, *although not parties*, having any liens or claims on the property *subsequent* to the mortgage may be barred of their equity of redemption or other interests in the property. (Rec., p. 2.)

The record shows that the assignments of interests in his purchase-money mortgage by Thomas E. Wilson to Mary J. Wilson, of Peekskill, New York, were recorded January 3, 1884, and June 18, 1884, (Rec., pp. 45, 46,) and that the mortgage by Mr. and Mrs. Davis to Messrs. Appleton & Co., of New York, for $15,000, is dated January 30, 1884, and was recorded February 12, 1884. (*Ib.*, pp. 47–49.)

These transactions are referred to in the testimony of Mr. Wilson, and of Mrs. Davis, as already stated.

2. The persons above named were necessary parties to any bill seeking to divest their rights in the mortgaged premises, and no decree could be made in their absence under the authorities cited above, and the fact that they could not be joined without defeating the jurisdiction did not authorize the Court to make a decree upon the bill without them. (Hagan *v.* Walker, 14 How., 36; Shields *v.* Barrow, 17 How., 141.)

Fourth.

The Court below should have dismissed the bill, and erred in adjudging that the mortgage sued on is a lien upon an undivided half interest in the land described, and in directing a sale of such interest therein to satisfy the mortgage.

1. It was incompetent for the Court to adjudicate upon the rights asserted by the defendants adversely to the mortgagor and mortgagee, and paramount to both, in this foreclosure suit. (2 Jones on Mortgages, sec. 1440.)

This Court, as we understand, has recognized the doctrine so clearly stated by Mr. Justice Field, when Chief Justice of California, in the case of *San Francisco* v. *Lawton* (18 Cal., 465), as to the nature and limitations of the equitable jurisdiction in suits for the foreclosure of mortgages, as follows:

"All persons who are beneficially interested either in the estate mortgaged or the demand secured are proper parties to the suit. *Adverse titles to the premises held by parties claiming by conveyance from the mortgagor prior to the mortgage, or from third parties prior or subsequent to the mortgage, are not the proper subjects of determination in the suit.* Such titles must be settled in a different action, giving rise, as they generally do, to questions of purely legal cognizance. (Eagle Fire Co. *v.* Lent, 6 Paige, 637; Corning *v.* Smith, 6 N. Y., 82; Holcomb *v.* Holcomb, 2 Barb., 23.) The foreclosure operates, except in a single instance, upon the estate or interest which the mortgagor possessed at the time, and the sale under the decree passes with like exception only such estate or interest. The exceptional instance arises where the mortgagor has, subsequent to the execution of the mortgage, acquired a title which enures, by way of estoppel, to the benefit of the mortgagee. In all other cases, the estate mortgaged is the only estate brought under consideration of the Court, and the only estate affected by its decree."

The validity of a tax title was accordingly said not to be the proper subject of determination in a foreclosure suit.

This Court in *Dial v. Reynolds* (96 U. S., 341) said:

"It is well settled that in a foreclosure proceeding the complainant cannot make a person who claims adversely to both the mortgagor and mortgagee a party, and litigate and settle his rights in that case. *Barbour, Parties in Equity*, 493, and the cases there cited."

In *Peters* v. *Bowman* (98 U. S., 60) the Court again said:

"It is the settled law of this Court that upon a bill of foreclosure, or, as in this case, a bill to foreclose a lien for the purchase money, no one claiming an adverse title can be permitted to bring it forward, and have it settled in that suit. Such a bill would be multifarious, and there would be a misjoinder of parties. Noonan *v.* Lee, 2 Bl., 449; Dial *v.* Reynolds, 96 U. S., 340."

As soon, therefore, as it was seen that Mrs. Davis claimed the land in good faith under a title adverse and paramount to the parties to the mortgage, it was for the Court below to dismiss the bill, as it had no jurisdiction to adjudicate upon her rights in this suit.

2. The mortgage sued on, which purported to cover the entire quarter section, was never a lien upon the undivided half interest in the land conveyed by Edward J. Wilson, the mortgagor, to Thomas E. Wilson, by deed dated May 22, 1871, recorded Sept. 11, 1875. (Rec., pp. 38, 39.)

The mortgage was made August 28, 1875, and recorded May 3, 1876, and Thomas E. Wilson was in actual possession of his undivided half of the land before and at the time the mortgage was given, under and by virtue of his *prior* deed, which was recorded *prior* to the recording of the mortgage.

The proofs show that the defendant, Thomas E. Wilson, was in actual possession of the land, in May, 1871, when he received his deed from the mortgagor, Edward J. Wilson, and continued in the actual possession of it until he sold it, in October, 1879, holding and claiming his interest in it as his own exclusively and absolutely. (Rec., p. 52.)

The Supreme Court of Florida, in *Massey* v. *Hubbard*, 18 Fla., 688, decided upon the construction and effect of the Statute in regard to the recording of the conveyances of real estate, that "where a purchaser of land receives a deed and enters into *possession and continues in actual occupancy*, but does not record his deed, such notorious occupancy constitutes constructive notice to 'subsequent purchasers or creditors,' to protect the holder of the deed against the creditors of the grantor."

The Court said:

"Creditors and subsequent purchasers stand upon the same footing in respect to notice of a prior conveyance not recorded. Craig immediately went into actual possession after his purchase, and has remained in the occupancy of the premises. This is constructive notice of ownership or of an interest, and the recording of a deed is but constructive notice. Any like notice is sufficient to put creditors and purchasers on inquiry. 64 N. Y., 76; 3 Kern., 180; 2 Barb. Ch., 555; 2 Paige, 300; 2 Mass., 508; 4 N. H., 262; 6 Wend., 213; 54 N. Y., 641; 1 Pick, 164; 9 Ala., 208, 443."

The mortgage, therefore, never attached as a lien to the one undivided half of the land transferred by Edward J. Wilson to Thomas E. Wilson, in 1871.

So, it is believed, the Court below decided in this case.

The Statute of Florida requiring conveyances of real estate to be recorded, provides, that "no conveyance, transfer or mortgage of real property, or of any interest therein, shall be good or effectual in law or in equity

against creditors or subsequent purchasers for a valuable consideration and without notice, unless the same shall be recorded in the office assigned by law for that purpose." (McClelland's Digest, p. 215.)

Symington, the mortgagee here, is neither a creditor nor a subsequent purchaser for a valuable consideration, without notice, in the sense of the statute.

The object of the recording act is to protect a party who gives credit, or purchases for a valuable consideration, upon the faith of property which he has reason to believe at the time belongs to him to whom the credit is given or from whom the purchase is made.

The mortgage of August 28, 1875, in this case, was given, not for any present consideration advanced at the time of giving the mortgage, but in order to better secure a pre-existing indebtedness, which was already secured on property in White Plains, New York. (Rec., p. 4.)

The bond is dated February 1, 1875, which shows that the debt was incurred *before* the date of the patent of the United States to Edward J. Wilson, which is dated April 10, 1875, and was recorded November 24, 1879. (Rec., p. 3.)

At the date of the mortgage (1) there was no deed of record to Edward J. Wilson; (2) he had no deed in his possession, and could have exhibited none; (3) he was not and never had been in personal occupation of the land.

The patent was delivered to Thomas E. Wilson from the Gainesville Land Office, in November, 1875, and remained in his possession until he sold the property to Mrs. Davis, who recorded the patent in November, 1879. (Rec., pp. 52, 58.)

Symington thus had no reason to believe that there was any title in Edward J. Wilson, but he had reason to believe, on the contrary, that the title was in Thomas E. Wilson, who was the sole occupant of the land.

As has been stated, the United States patent, though dated April 10, 1875, was not delivered to Thomas E. Wilson from the Gainesville Land Office until *November*, 1875, which was two months *after* the execution of the present mortgage (Rec., pp. 52, 58).

At the date of the mortgage, therefore, the legal title to the land had not finally passed from the United States to Edward J. Wilson, who had only an equitable title.

When the patent was delivered, Thomas E. Wilson had a perfect legal title to an undivided moiety of the property by virtue of his warranty deed from Edward J. Wilson of May 22, 1871 (Rec., p. 38).

The attempt of Edward J. Wilson to mortgage the interest of Thomas E. Wilson in the land, was, in fact, an attempted fraud upon him and his rights, of which Symington must be deemed to have had notice, when he took the mortgage.

3. In the absence of any opinion by the Court below, it may be supposed that it assumed to disregard the independent and paramount title of Mrs. Sarah J. Davis to the other undivided moiety of this property, based upon the purchase of that interest, at the tax sale, by Thomas E. Wilson, and the tax deed to him from the State of Florida, dated January 16, 1879, which, the defendants maintain, defeated the lien, if any, of the mortgage sought to be foreclosed (Tax Deed Rec., p. 40).

Under the authorities above cited, however, that independent and paramount title could not be litigated and adjudicated in this foreclosure suit.

The tax title of Thomas E. Wilson was obtained under the statute of Florida of 1874, chap. 1976, after payment of the amount of the tax due on his own moiety; and it is held by this Court that where one tenant in common pays the tax on his undivided share, the interest of the other may be sold for the balance of the assessment. (Ronkendorff *v.* Taylor, 4 Pet., 362.)

Thomas E. Wilson, under the circumstances as they existed, and after the attempt of his co-tenant to encumber the whole property, having paid the amount separately assessed and due on his own moiety, had the right to purchase the interest of the co-tenant at the tax sale. (Freeman, Co-tenancy & Partition, Sec. 158.)

He was under no obligation or duty to pay the tax assessed on the moiety of the other tenant, and he was as free, therefore, to become the purchaser at the tax sale as any other person.

One tenant in common may disseise another; and the purchase by a co-tenant at a tax sale of the interest of his co-tenant, and the taking of a deed therefor, show his purpose to claim the whole title adversely to his co-tenant. (Oglesby *v.* Holliston, 76 Cal., 136; Pillow *v.* Roberts, 13 How., 477.)

By section 63 of the Florida act of February 17, 1874, chap. 1976, it is provided as follows:

> No suit or proceeding shall be commenced by a former owner or claimant, his heirs or assigns, or his or their legal representatives, to set aside any deed made in pursuance of any sale of lands for taxes, or against the grantee in such deed, his heirs or assigns or legal representatives, to recover the possession of said lands, unless such suit or proceedings be commenced within one year after the recording of such deed in the county where the lands lie, except upon the grounds that the said lands were not subject to taxation or that the taxes were paid or tendered, together with the expenses chargeable thereon before sale, and the recording of such deed shall be deemed such assertion of title or such entry into possession by the grantee, his heirs or assigns, as to authorize such suit or proceedings against him or them as for an actual entry: *Provided*, That infants, persons of unsound mind or under guardianship or imprisoned, may commence such suit or proceedings within one year after such disability shall cease. (Laws of Florida, 1874, chap. 1976, p. 27.)

By Sec. 60 of this act the tax deed is made *prima facie* evidence of the regularity of the proceedings, from the valuation of the land by the assessors to the date of the deed, inclusive, and of title to the purchaser. (*Ibid*, p. 26.)

Under the act the lien for taxes attaches to the *res*, without regard to individual ownership, and when enforced by sale pursuant to the statute, the purchaser acquires a valid paramount title in fee. (Spratt *v.* Price, 18 Fla., 290; Paul *v.* Fries, *ib.*, 572; Sams *v.* King, *ib.*, 558; Mundell *v.* Freeman, 23 Fla., 529.)

The Court below should have held, therefore, that the tax deed could not be attacked, or impeached, except for the causes mentioned in this act, and that, in this proceeding, the tax deed protected Mrs. Davis, who was in possession of the land, claiming exclusive title under that deed for six years before the suit was instituted. (Florida Savings Bank *v.* Brittain, 20 Fla., 514; L'Engle *v.* F. C. & W. R. R. Co., 21 Fla., 353; De Treville *v.* Smalls, 98 U. S., 517.)

As under the Florida act of 1874 the purchaser at a tax sale acquires an original and not a derivative title, the tax-deed from the State passes to the purchaser the fee of the land, freed from all prior liens and encumbrances on the former estate. (2 Blackwell on Tax Titles, sec. 965; Spratt *v.* Price, 18 Fla., 290.)

The court below should have decided, therefore, that by the effect of the tax deed from the State of Florida to Thomas E. Wilson, of January 16, 1879, Mrs. Davis, as his grantee, acquired a valid title to an undivided moiety of this property, freed from the lien of the present mortgage, and that the effect of that deed could not be avoided or disregarded in this foreclosure proceeding.

The validity of the tax title held by Mrs. Davis could not be adjudicated in this suit.

The only decree which the court could properly make, therefore, was a decree dismissing the bill.

Fifth.

The Court below, in assuming jurisdiction to determine the validity of the adverse and paramount title asserted to this property, should have protected the rights of Mrs. Davis, and her husband, in the valuable improvements upon the land, by restricting the complainants to the unimproved south half for the satisfaction of the mortgage, or providing expressly in the final decree that any sale should be subject to the rights and equities of Mrs. Davis and her husband in respect to the improvements, and the advances made by defendants for the protection of the property.

1. In *Canal Bank v. Hudson* (111 U. S., 82) this Court said:

"The present case has an analogy to that of a purchaser at a foreclosure sale, who makes valuable improvements in the belief that he has acquired an absolute title. He is entitled to be paid for them if the premises are redeemed. (2 Jones on Mortgages, sec. 428). Where a party lawfully in possession under a defective title makes permanent improvements, if relief is asked in equity by the true owner, he will be compelled to allow for such improvements. (2 Story Eq. Jur., sec. 1237, *note* 1; Bright *v.* Boyd, 1 Story, 478, and 2 Story, 605; Putnam *v.* Ritchie, 6 Paige, 390: Williams *v.* Gibbes, 20 How., 535.)"

The general doctrine thus affirmed by this Court was also recognized and enforced in *Evans* v. *Thomas*, 105 N. Y., 601; *Mickles* v. *Dillaye*, 17 N. Y., 86; *Minor* v. *Beekman*, 50 N. Y., 345.

It is, also, well settled that in a suit by a co-tenant out of possession for partition of the premises, upon which the other has paid taxes, and made improvements, in good faith, a Court of Equity will set out the portion improved to the party who has made the improvements, where it can be done without injustice, or will award

proper reimbursement and suitable compensation to the improving co-tenant for such taxes and improvements. (1 Story, Eq. Jur., sec. 655, 12th ed; Freeman, Co-tenancy and Partition, secs. 509, 510; Knapp on Partition, 377; Ford *v.* Knapp, 102 N. Y. 135; Hall *v.* Piddock, 21 N. J. Eq., 311).

2. Tested by these principles, the decree below, in any view of the case, was improper, and should be set aside.

The proofs show that the valuable improvements made upon the property are situated on the *north* half of the tract, and cannot equitably be affected with this mortgage, which in any event should be confined and restricted to the unimproved half of the land.

In no event, would Edward J. Wilson, if living, be permitted by a Court of Equity to have partition, except upon the condition of a *full and compensatory adjustment* of the rights of defendants in respect to the taxes paid and improvements made by them upon the property.

The mortgagee, and the complainants, as representing him, can stand in no better position, and can have no greater rights, in respect to the property, than the mortgagor from whom their interest was derived.

It is manifest, therefore, that any decree for complainants, in this suit, should either confine and restrict the lien and sale explicitly to the unimproved south half of the land, or should be so framed as to expressly save and protect the rights and equities of defendants in and in respect to the permanent improvements, and the advances for taxes to protect the property, as they may be hereafter determined in partition, or other appropriate, proceedings in relation to the property.

Sixth.

The order and decree of April 12, 1887, confirming the alleged sale of this property by William Capers Bird, as

reported by him, was palpably erroneous, and it should in any event, be reversed, with directions to the Court below to set aside the sale as not in conformity with the final decree, and as made without authority of law and void.

1. The decree of sale was passed on January 19, 1887, and it appointed one John S. Driggs the Master to advertise, conduct and make the sale, which was fixed for the 1st Monday in March, which was the 7th of March, 1887.

It appears by the transcript that on the 5th of March, 1887, the District Judge telegraphed from Defuniac Springs to the clerk of the court at Jacksonville, directing him to "enter order, *nunc pro tunc*, substituting Bird for Driggs, Master, in *Watt* v. *Anderson*," and that the clerk thereupon formulated what purports to be an order purporting to *amend* the third paragraph of the final decree, by substituting Wm. Capers Bird for John S. Driggs, appointed master, *pro hac vice*, to advertise and make the sale, which so-called order the clerk purported to enter on March 7, 1887, *nunc pro tunc*, as of January 19, 1887. (Rec., p. 85.)

This so-called order and decree does not even purport on its face to be made by the *Circuit Court*, and it was not signed, or apparently seen, by any Judge of the Circuit Court, nor does it appear that the court was in *session* when it was entered by the clerk, and the inference from the entry itself is that it was made somewhere in the clerk's office, when the court was not in session.

The so-called order was entered in the Clerk's office on the day when the sale was made, but whether it was so entered *before* or *after* the sale does not appear.

It was not founded upon any petition, application, affidavit, or motion, in the cause; and the defendants, of course, were not heard, and had no opportunity of being heard, as to any alteration of the final decree in the particular indicated by this so-called order.

2. It is plain that this so-called order is not an order or decree of the Circuit Court, in the cause, and can be treated only as an absolute nullity.

Courts and Judges must act judicially in all things, and are not authorized to exert their power except in certain well-defined ways. (Windsor *v.* McVeigh, 93 U. S., 282.)

The telegraphic communication between the District Judge and the Clerk of the Court, was wholly a non-judicial proceeding, not to be regarded anywhere as having any efficacy.

No legal order could be made by the Court, or a Judge thereof, for an alteration, or amendment, of the decree, after it had been entered and recorded, without a formal rehearing, under the Rules prescribed by this Court for the Circuit Courts in Equity causes. (Rules, 85, 88.)

Clerical mistakes in decrees, or errors arising from an accidental slip or omission, may be corrected, before an enrollment of the decree, by order of the Court, or a Judge, upon a petition, without a formal rehearing, but a decree cannot be changed or modified, even before enrollment, at the term at which it was entered and recorded, without a *rehearing*, granted upon a petition signed and verified in the manner prescribed by *Rule 88*.

And under that Rule, no *rehearing* even could be granted, in this case, after the *term* at which the final decree was entered and recorded.

If the Circuit Court, therefore, had purported to make this so-called order for an amendment of the final decree, it would have been incompetent and illegal, as there was no rehearing granted, and no petition for a rehearing presented in the cause.

Nor would it have been competent for the Court to make and enter an order for such an alteration of the final decree, *nunc pro tunc*, under the rule laid down by this Court. (Gray *v.* Brignardello, 1 Wall., 636.)

3. As there was no decree or order of the Circuit Court appointing Mr. Bird an officer to sell the property, or authorizing him to sell, the sale was without authority of law and void.

A judicial sale is defined by this Court to be "one made under the process of a Court having competent authority to order it, *by an officer legally appointed and commissioned to sell.*" (Williamson *v.* Berry, 6 How., 547, 548.)

The Court has often held that a sale in a foreclosure suit, unauthorized by the decree, is without authority of law and a nullity. (Shriver *v.* Lynn, 2 How., 43; Gray *v.* Brignardello, 1 Wall., 627; Minnesota Co. *v.* St. Paul Co., 2 Wall., 641.)

It is clear therefore that the Court below should have sustained the objections of the appellants to the confirmation of this sale, and set aside the sale.

Seventh.

The record shows that if any notice of the sale was advertised at all, it was not advertised in compliance with the requirement of the final decree upon that subject.

1. The decree in appointing John S. Driggs as Master *pro hac vice* to advertise and make the sale, required *him* to give thirty days' notice of the time, place, and terms of sale in a newspaper published in Orange county.

W. C. Bird, in his report, which seems to have been made on the 7th of March, 1887, states that *he* gave thirty days' previous public notice by advertisement in the Sandford Journal, &c., "and the publisher's certificate of advertisement, hereto attached, marked Exhibit A, is hereby prayed to be taken as part hereof." (Rec., p. 79.)

No publisher's certificate, or other proof of any advertisement of the sale, is contained in the record.

It is manifest that Bird could not have given the notice, as he says he did, unless he advertised it long *before* the telegram of the District Judge of the 5th of March, 1887, and the so-called order of March 7, 1887, which was the day of sale, when there was not, and could not be, the least pretense or color of right or authority, on his part, to advertise the property for sale, or make the sale.

2. So far as the record shows anything about the advertisement of notice of the sale, it was made by a person wholly unauthorized to sell the property, or advertise it for sale, and his advertisement, therefore, as made, was good for nothing, and a nullity.

In the legal view of the matter, the property was sold without any advertisement at all of the time, place, and terms of sale, in conformity with the requirements of the final decree of the Court.

The sale, for that reason, therefore, was a wholly unauthorized proceeding, and null and void.

Eighth.

The report of W. C. Bird shows that the alleged sale was otherwise not in conformity with the provisions of the final decree in the cause.

The decree provided for a sale of "*an undivided one-half interest* in and to the following lands," &c. (Rec., p. 78.)

W. C. Bird reported that he offered "*said land* for sale," and that James S. Watt "purchased *said land*," &c. (*Ib.*, p. 79.)

As the final decree did not provide for a sale of the land, but authorized only a sale of an undivided half-interest in the land, the reported sale was without any support in that decree.

It is respectfully submitted that the whole proceeding in this case was without any jurisdiction, and erroneous, and that the final decree should be reversed with costs to appellants, and that the cause should be remanded to the court below with a direction to dismiss the suit with costs to them in that court.

J. HUBLEY ASHTON,
Counsel for Appellants.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1888.

JAMES C. ANDERSON,
Administrator of Edward J. Wilson, deceased.
THOMAS E. WILSON
AND
SARAH J. DAVIS
vs.
JAMES S. WATT,
Executor of James Symington, decd.

No. 740.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES, DISTRICT OF FLORIDA.

MOTION TO DISMISS.

Now comes the appellee by James Lowndes, his attorney, and moves,—

1. To dismiss the above appeal of Sarah J. Davis as not within the jurisdiction of the court, because it does not appear that the value of the matter in dispute exceeds $5,000, and because it appears that such value does not exceed $3,000.

2. To dismiss the above appeal of Thomas E. Wilson as not within the jurisdiction of this court, be-

cause there is no decree against the said Wilson, and because if any matter is in dispute between him and the appellee, the value of such matters does not appear to exceed $5,000, and appears not to exceed $3,000.

3. To affirm the decree against James C. Anderson, administrator of Edward J. Wilson, deceased, because there was no issue between him and the appellee, and it is manifest that the appeal of Anderson was taken for delay only.

JAMES LOWNDES,
Attorney for Appellee.

BRIEF OF APPELLEE ON MOTION TO DISMISS.

STATEMENT OF FACTS.

The appellee was complainant below. The bill was filed August 25, 1885. It averred that Edward J. Wilson had executed to the complainant's testator, James Symington, a bond conditioned for the payment of $13,000, and had, on February 1, 1875, executed to him as an additional security for the said bond, a mortgage on a parcel of land containing 143 acres, and designated in the Government Survey as "southwest quarter of section 30, Township 19, South Range 30 east, in the northern District of Florida." The object of the suit was to obtain a sale of this land for the purpose of satisfying the said bond.

The defendants to this bill were James C. Anderson, the administrator of the said obligor, (Edward J. Wilson,) Thomas E. Wilson and Sarah J. Davis.

James C. Anderson, the administrator, and Thomas E. Wilson filed a joint answer, in which they admitted

the debt and did not allege any payments on account of it. They alleged that Thomas E. Wilson had a title in the said parcel paramount to that of the mortgagee, and that Thomas E. Wilson had conveyed his title to his co-defendant, Sarah J. Davis. On that ground only they denied the right of the complainant to relief.

Sarah J. Davis filed her answer, averring that she is the present owner of the parcel described, and insisting that her title, as derived from Thomas E. Wilson, was prior and paramount to the title of the mortgagee as derived from the mortgage. She admitted the said debt and made no allegations of payments on account of it.

A decree was made January 19th, 1887. It established the debt, sustained the contention of the defendant, Davis, as to an undivided half of the land, and overruled it as to the other half, and directed an undivided one half of the land to be sold to satisfy the complainant's debt.

On March 7th, 1887, the sale of *one half* of the land was made under the decree by the Master at public outcry at the Court House door in Jacksonville, after thirty days' notice, and the complainant became the purchaser at $3,000.

Objections were made to the sale, but on April 12th, 1887, it was ordered to stand confirmed, unless the defendants, within a period limited, perfected a supersedeas, which they did. An appeal was allowed to all the defendants on the day on which the order of confirmation was made.

The actual value of the land in dispute is nowhere averred in the pleadings. They only contain averments as to the prices at which the land had been sold at several sales before the filing of the bill, or as to the prices mentioned in the deeds effecting the said

sales. The last of these sales was on the 13th of October, 1879, several years before the date of the filing of the bill, (August, 1885). There are also averments as to the sums expended in the improvement of the land before the filing of the bill.

ARGUMENT.

The following facts appear from the above statement,—

1. There is no ground whatever for the appeal of Anderson, the administrator of Edward J. Wilson, the mortgagor. The debt and the mortgage were not in dispute, and the only effect of the decree as against Anderson was to establish the debt. But that had been admitted. The only object of the appeal of Anderson is delay, and the decree as against him should be affirmed.

2. There is no decree against Thomas E. Wilson, and nothing to give this court jurisdiction of his appeal. If it be said that he is entitled to appeal because he is indirectly interested in the decree against Sarah J. Davis, then the value of the matter alleged to be in dispute does not exceed $5,000, as will be argued below, it being the same matter which is in dispute between Mrs. Sarah J. Davis and the appellee.

3. The only controversy in the suit was between the appellee and Sarah J. Davis. He sought to have the parcel of land described sold to satisfy his mortgage, she contended that she had a title paramount to the mortgage and that, therefore, the land could not be sold under the mortgage. The parcel of land was therefore the only matter in dispute.

The decree was that one half of the land was so applicable and it was decreed to be sold, and to that extent the decree affected the rights of the defendant,

Sarah J. Davis. The undivided half of the parcel of land in the matter in dispute or this appeal and the jurisdiction of the court depends upon its value.

It is submitted,—

First. That it *does not* appear affirmatively that the parcel exceeds in value the sum of $5,000.

Second. That it *does* appear that its actual market value at the time of the appeal was $3,000.

The pleadings are absolutely silent as to its value. The proceedings on the part of the appellant at the allowance of the appeal are equally silent on the subject.

The averments in the pleadings as to prices at which the land sold are not equivalent to averments of its value.

They moreover relate to prices on sales long anterior to the filing of the bill. So, also, the averments as to moneys expended on the land do not amount to averments as to its value at the date of the ~~appeal or the filing of the bill.~~ decree. It may well be that the prices were too high and the expenditures futile, or that the value had depreciated in the long period between those transactions and the ~~appeal or the filing of the bill.~~ decree.

The burthen was on the appellant to establish the jurisdiction affirmatively and she has entirely failed to do so.

Troy *vs.* Evans, 91 U. S., 1.

The appeal should be dismissed because there is no averments of the jurisdictional sum in the record.

But the record shows affirmatively that the value of the matter in dispute is below the jurisdictional sum.

On the seventh of March, 1887, the parcel in dispute was sold under the decree at public outcry for $3,000. This occurred but a short time ~~before~~ after the ~~appeal was allowed.~~ decree.

* Street v Terry 119 U.S. 385

Zeckendorf v Johnson 124 U.S. 617.

We have, therefore, in the record the very best proof of the value of the land, viz: the price it brought at public sale after ample notice to all the world. The sale was objected to by the defendants but not on the ground that the price was inadequate.

It is submitted that the appeal of Mrs. Sarah J. Davis should be dismissed because the value of the matter in dispute does not exceed $5,000.

JAMES LOWNDES,
Attorney for Appellee.

IN THE

Supreme Court of the United States.

J. C. ANDERSON, Administrator, *et al.*,
vs.
JAMES S. WATT, Executor.

No. 138.
October Term,
1890.

Note of Additional Authorities for Appellants.

It was supposed to be unnecessary to cite authorities for the obvious proposition in the brief for appellants (p. 37) that the patent of April 10, 1875, to Edward J. Wilson enured to the benefit of Thomas E. Wilson, his grantee in the warranty deed of May 22, 1871 (Rec., p. 38); but the tenor of the argument for the appellee renders it proper to print this reference to the authorities upon the subject as collected in Mr. Rawle's work on *Covenants for Titles* (5th Ed., Secs. 247, 248, pages 366, 367, 384).

The leading cases in this Court are *Van Rensselaer* v. *Kearney*, 11 How., 325; *French* v. *Spencer*, 21 How., 240; *Bush* v. *Marshall*, 6 How., 284; *Irvine* v. *Irvine*, 9 Wall., 618; *McCarthy* v. *Mann*, 19 Wall., 20.

But the patent to E. J. Wilson was not a new acquisition, but a confirmation, of title, as he already had the equitable title of the land by the deed of Earnest and wife of March 15, 1871 (Rec., p. 36).

Earnest commuted for the land, and had his final receipt for the purchase money from the United States Land Office in Florida (Rec., p. 57, fol. 115, 116; *ib.*, p. 20).

He had thus a perfect right to sell and convey at the time he made his deed to Edward J. Wilson (Bush *v.* Marshall, 6 How., 284; Thredgill *v.* Pintard, 12 How., 24; Irvine *v.* Irvine, 9 Wall, 626; Wright *v.* Shumway, 1 Biss., 27).

J. Hubley Ashton,
Counsel for Appellants.

Office Supreme Court U. S.
FILED,
JAN 7 1891

IN THE

Supreme Court of the United States.

Appeal from the Circuit Court of the Northern District of Florida.

J. C. ANDERSON, Administrator, *et al.*

vs.

JAMES S. WATT, Executor.

No. 138.
October Term, 1890.

ARGUMENT FOR APPELLEES.

On the Merits.

The substance of this controversy is as follows:

On August 28, 1874, E. J. Wilson executed to James Symington a mortgage of a parcel of land in Florida to secure a debt of $13,000. The legal title of this land had been conveyed by the United States to the mortgagor, E. J. Wilson, by patent bearing date the 10th April, 1875. At the time of the mortgage no conveyance of any kind affecting the title of E. J. Wilson in the land was on record. It is not alleged or proved that Symington, the mortgagee, had at the date of the mortgage knowledge or notice of any equitable interests in the land vested in third parties. As far as the record and his knowledge were concerned he took a good title by his mortgage. The appellee, the executor of Symington, filed his bill in the Circuit Court of Florida to establish this debt and to enforce the said mortgage by a sale of the land. The

defendants in the bill were the administrator of the mortgagor and Thomas E. Wilson and Sarah J. Davis, who were alleged to be in possession of the land and to make claim to an interest in it.

There is no controversy as to the debt. The administrator alleges that the title in the land has passed out of the successors of E. J. Wilson and vested in Mrs. Sarah J. Davis by a title paramount to that of the mortgagee. There is accordingly no controversy between the complainant and the administrator of Wilson in regard to the land.

Thomas E. Wilson avers in his answer that he acquired title in the land paramount to that of the mortgagee and conveyed it to Sarah J. Davis. There is, therefore, no controversy between the complainant and Thomas E. Wilson.

Sarah J. Davis avers in her answer that Thomas E. Wilson acquired title in the land paramount to that of the mortgagee and conveyed it to her. She insists that she has the better right to the land as against the complainant.

The substantial point in issue is whether the title of Mrs. Davis is superior to that of the mortgagee. Mrs. Davis derived title from Thomas E. Wilson by deed of October 13, 1879, so that the real question is whether Thomas E. Wilson had acquired a better title than the mortgagee. Thomas E. Wilson alleges himself to have acquired the whole title by undivided moieties at different times and in different ways, so that his alleged title in each moiety has to be discussed separately.

1st. As to one undivided moiety Thomas E. Wilson claimed title by the conveyance of E. J. Wilson on May 22, 1871.

When E. J. Wilson professed to make this conveyance he had no legal or equitable title in the land.

He had no legal title in it because the patent of the United States to him was not executed until April 10, 1875 (p. 39). He had no equitable title in it. An equitable title may be asserted to have been vested in him by the deed of Earnest of March 15, 1871 (p. 36). It appears that Earnest had supposed himself to have acquired inchoate title under the homestead law, but that his right was not recognized at the land office, and that a long time thereafter E. J. Wilson paid for the land (fols. 43, 115, 116). Earnest therefore never had any right in the land. If, however, Earnest acquired a homestead right, his assignment of it was void.

Anderson *v.* Carkins, 135 U. S., 483.

It follows that Thomas E. Wilson took nothing by the deed of May 22, 1871, and that the whole legal and equitable fee was in E. J. Wilson when he made the mortgage to Symington.

But if T. E. Wilson obtained by that deed an equitable title he was in no better position as regards the mortgagee. The latter was a purchaser *bona fide* for value of the legal title without notice of any equitable title in T. E. Wilson.

The mortgage was executed on the 28th August, 1875. E. J. Wilson had on the 10th April, 1875, acquired the legal title by the patent from the United States. This took effect from the date of its execution (U. S. *v.* Schurz, 102 U. S., 378). Symington therefore took the legal title by his deed.

When he took the legal title he had neither notice in law nor fact of the alleged equitable estate of T. E. Wilson. He had no notice by the record, because the deed of E. J. Wilson to T. E. Wilson was not recorded until September 11, 1875 (p. 38).

There was no attempt to show that Symington had

knowledge in fact or notice of the alleged equitable rights of T. E. Wilson.

Mrs. Davis does not in her answer even allege that Symington had such knowledge or notice. In the answer of Anderson and T. E. Wilson it is alleged that Symington "had full and ample notice of the rights of said Thomas E. Wilson from his open and notorious and sole possession of said property." It would be a dangerous doctrine that purchasers of the legal title for valuable consideration are bound by equitable rights of persons who happen to be on the land.

As regards this undivided moiety of the mortgaged land the title of the mortgagee is therefore good as against Mrs. Davis.

In respect of the other undivided moiety of the mortgaged land, Mrs. Davis asserts that she has a better title than the mortgagee, by virtue of a tax sale and conveyance thereunder made after the execution of the mortgage.

By the laws of Florida (see appendix to this brief) taxes are assessable in respect of parcels of land as they are designated and delineated on the United States surveys, and the sales for taxes in arrears are directed to be made by such parcels. The sales directed are sales of the whole estate in the land and the statutes make no provision for lesser estates carved out of, or making up, the fee. It follows that where lands are held by tenants in common, the whole tax is a charge upon the whole land.

They also provide that the land shall be struck off to the person who should bid to pay the taxes for the least number of acres, and that the portion sold for taxes shall be taken from the southeast portion of the parcel in a square form as near as could be.

Taxes were assessed against the undivided moiety of the mortgagor, E. J. Wilson, in the lands for the years 1876 and 1877. There does not seem to have been any

authority in law for this act of the assessor. On January 8, 1878, the undivided moiety of E. J. Wilson was sold for those taxes and bought by the defendant, T. E. Wilson, for $41.13, and conveyed to him on January 16, 1879 (fol. 109, 81). On October 13, 1879, he sold this moiety to Sarah J. Davis for $4,000.

The sale is probably void because of its irregularity. But if that is not so, it is certainly voidable as against the mortgagee.

At the time of the purchase by T. E. Wilson, he was (according to his contention) tenant in common of the land with the other owners. Not only that, but the other owner had been his deceased uncle, and the title was in the latter's successors. He had been put in charge of the land by his uncle and co-tenant (folios 104, 105). He was in possession of the land, and presumably in receipt of the issues. There is no allegation that he gave any notice of the taxes to the mortgagee or any one else.

T. E. Wilson cannot retain a title acquired under such circumstances.

It is the settled law of this country that a tenant in common cannot acquire the interests of his co-tenant in this way.

> Cooley on Taxation, pp. 500, 501, 502, and cases cited.

This rule was adopted by this Court in the case of Chapin *v.* Streeter, 124 U. S., 360. It appears from the bill of exceptions in that case that the parties were tenants in common, and the case goes on the principle that it was the duty of one tenant in common to pay the tax assessed against the property held in common. There were not in that case the circumstances which make the dereliction of this alleged co-tenant especially flagrant.

> See also Rothwell *v.* Dewees, 2 Black., 613.

So an agent cannot acquire title against his principal by purchase at a tax sale.

Rothwell *v.* Dewees, 2 Black., 613.

See also Jackson *v.* Ludeling, 21 Wall., 216.

T. E. Wilson had been the agent of his uncle, and by his contention was tenant in common of the lands. In each of these characters he was incapacitated from acquiring the title.

The statute of Florida cited in the appellant's brief (p. 35) has no reference to equitable rights, but obviously is intended to limit the time for impeaching the validity of a tax at law.

Mrs. Davis derives title through the tax deed (folio 57), and had full notice of the character of T. E. Wilson's title in this moiety, and of the gross inadequacy of the price paid by him.

The mortgage had been put on record May 3, 1876, and the record of it was notice to her. In view of all circumstances, she was put on enquiry, and does not appear to have made any.

She cannot now deny that T. E. Wilson was tenant in common without conceding that he is not entitled to the other moiety of the land.

Inasmuch as the decree below gave the complainant only one undivided moiety of the land, it must be sustained if the appellee shows a good title as to either undivided moiety. No claim is made in argument as to the moiety alleged to have been purchased from E. J. Wilson. If this claim is abandoned, the decree must be affirmed.

It is insisted that the decree should have been expressed to be without prejudice as to the alleged rights of Mrs. Davis in respect of permanent improvements upon the property and expenditure and advances made

in relation thereto by her, or should have decreed a sale in severalty of the southern moiety of the land on which were no improvements.

Mrs. Davis clearly had no equity in regard to her improvements arising from her ignorance of the title of mortgagee which was of record. The mortgagee has not "fraudulently concealed his title and thereby misled the defendant."

Story Eq., § 799, a, 799 b.
Pomeroy Eq., § 1241, note.

If she has any equity (which is not conceded) it arises out of her relation of tenant in common with the mortgagee. But that equity is one which can be enforced only on a partition. The Court did not and could not have in this bill decreed partition.

The decree does not displace or in any way affect her alleged equity, if she has one. It simply establishes the right of the mortgagee as tenant in common and he takes his undivided moiety subject to all its burthens. The consideration of her rights in this respect will be proper when partition is sought. It is now premature.

The above argument is submitted as an answer to the assignments of error which relate to the merits, viz., the seventh, ninth, and tenth. It is submitted that on the merits the decree was right, and should be affirmed.

On the Objections to the Decree not Relating to the Merits.

Fifteen errors have been assigned. Three of these, relating to the merits (seventh and ninth and tenth), have been discussed above. The other alleged errors touch the jurisdiction of the Circuit Court and questions of practice.

I. It is assigned for error that the record does not disclose a controversy within the jurisdiction of the Circuit Court.

The original bill sets forth a controversy between citizens of New York on the one hand and citizens of the State of Florida on the other. Over such a controversy the Circuit Court had jurisdiction.

The bill was amended on February 20, 1886, by striking out the allegation that the complainant Watt is a citizen of New York, and by inserting the allegation that he is a subject of the kingdom of Great Britain, and by striking out Gustavus W. Faber as a complainant (p. 68). These amendments are simultaneous. On the face of the amended bill the controversy is between a subject of a foreign State and citizens of a State. This is a controversy within the jurisdiction of the Circuit Court.

So far, therefore, *as the record is concerned*, the Circuit Court appeared to have jurisdiction of the suit throughout its course.

But it is argued that *in point of fact* the Circuit Court had not jurisdiction of the cause.

In support of this view it is urged that Mrs. Davis was not a citizen of Florida at the time the action was begun.

The answer to this is, 1st, that is not averred in the record that she was not a citizen of Florida; 2d, that it is not proved that she was not a citizen of Florida; 3d, that if it had been shown that she was not a citizen Florida but a citizen of New York, this fact would not have defeated the jurisdiction.

1st. It was alleged in the bill that Sarah J. Davis was a citizen of the State of Florida. It was open to her to deny this fact by plea, and if the plea was sustained, the Circuit Court was without jurisdiction as the record then stood.

Instead of pleading that she was not a citizen of

Florida, Mrs. Davis filed a plea *that her husband is still living, to wit, in the city and State of New York.*

This plea is both irregular and insufficient.

It is not accompanied by the certificate of counsel or the affidavit of the defendant (that it was not interposed for delay) which are required by the 31st Rule in Equity.

It speaks as of its date (December 7, 1885), and not as of the commencement of the suit (August 25, 1885).

Mullan *v.* Torrance, 9 Wheaton, 537.

Assuming the citizenship of Mrs. Davis to be in law that of her husband, the citizenship of the latter is not averred. The allegation that *he is living in New York* is not equivalent to an allegation that she is a citizen of New York.

Residence and citizenship are not synonymous.

Robertson *v.* Cease, 97 U. S., 646.

Everhart *v.* Huntsville Female College, 120 U. S., 223.

Menard *v.* Goggan, 121 U. S., 253.

The averment that a party had a "fixed and permanent domicile" in a State is not equivalent to an averment of his citizenship in that State.

Brown *v.* Keene, 8 Pet., 112.

There is no difference in meaning between the words "to reside" and "to live" (*i. e.* in a place).

Webster's Dictionary, s. v. live.

Worcester's Dictionary, s. v. live.

Century Dictionary, s. v. live.

2d. Inasmuch as the plea did not aver that Mrs. Davis was a citizen of New York, or that her husband was a

citizen of New York, those facts were not admitted by setting down the plea for hearing.

There was no proof offered that Mr. Davis was a citizen of New York. Mrs. Davis testified, but does not say so. The pleadings and the witnesses avoided any such allegation.

3d. But even if it had been shown that Mrs. Davis was a citizen of New York, the jurisdiction would not have been defeated.

The suit would, on the original bill, have stood, in that supposition, as one between citizens of New York on the one side, and citizens of Florida and a citizen of New York on the other. The Court would have had jurisdiction of the controversy between some of the parties. Such a bill is amendable, and the supposed defect would have been curable by amendment.

In Conolly *v.* Taylor, 2 Peters, 557, it was decided that the joinder of a party not competent to sue does not defeat the jurisdiction, but the bill is amendable.

Carneal *v.* Barks, 10 Wheaton, 181, is to the same effect.

The record shows that at the beginning of the suit, Watt was a citizen of Great Britain. If, therefore, the plea as to the citizenship of Mrs. Davis had been sustained, it would have been open to the complainants to amend their bill so as to make it accord with the actual facts by averring the British citizenship of Watt and by striking out Faber as complainant. The suit would then have been between the subject of a foreign State and the citizens of State, which is one within the jurisdiction of the Circuit Court.

This has been actually done, and the suit as it now stands is one in respect of which the citizenship of any defendant in New York is immaterial, if that fact is taken to have been shown.

The allegation having been made in the amended bill

that Watt was a citizen of Great Britain, it was open to the defendant, Davis, to have denied. This not having been done, it must be taken as true.

It follows that the objection to the jurisdiction of the Circuit Court is not well taken.

II. It is argued that the husband of Mrs. Davis and that D. Appleton & Co. are necessary parties.

1st. The 53d Rule in Equity is as follows:

"If a defendant shall, at the hearing of a cause, object that the suit is defective for want of parties, not having by plea or answer taken the objection and therein specified by name or description the parties to whom the objection applies, the Court (if it shall think fit) shall be at liberty to make a decree saving the rights of the absent parties."

This is only the expression of the general rule of practice, that a defect for want of parties not absolutely necessary, must be expressly objected to.

The non-joinder of Mr. Davis was not objected to in the pleadings and does not appear to have been objected to at the hearing. The objection comes too late.

Mrs. Davis never objected below to the non-joinder of her husband, of D. Appleton & Co., or of Mary F. Wilson. She is the real defendant and the objection cannot now be made on her behalf.

In the answer of E. J. Anderson and J. E. Wilson an interest is averred in Mary F. Wilson and D. Appleton & Co., but their non-joinder is not objected to and those defendants have no interest in the land.

2d. The persons named were not necessary or indispensable parties, but only proper or convenient parties and could be dispensed with even if objection had been taken to their non-joinder.

Mr. Davis is said in argument to have a beneficial

interest in the land. D. Appleton & Co. and Mary F. Wilson are said to have liens on the equity of redemption derived from Mrs. Davis.

The interests so alleged are distinct and several and will not be affected by the decree. The persons named are therefore not indispensable parties.

The interests of Mary F. Wilson and D. Appleton and Company are *incumbrances* only of the equity of redemption and on that ground those persons are not necessary parties.

Jones on Mortgages, secs. 1374, 1395.

Mary F. Wilson and D. Appleton & Co., are alleged to hold incumbrances on the *paramount title*. No person claiming by a paramount title is a necessary party. The object of a foreclosure suit is to foreclose the equity of the mortgages of those claiming under him subsequently to the mortgage. If the holders of the paramount title are made parties, it is done at the will of the actor in the suit, from views of expediency and not of legal necessity. Those claiming by paramount title are neither necessary nor proper parties. They are merely convenient parties.

The husband's *jus mariti* and curtesy seem to have been abolished in Florida.

"2. Hereafter, when any female, a citizen of this State, shall marry, or when any female shall marry a citizen of this State, the female being seized or possessed of real or personal property, her title to the same shall continue separate, independent, and beyond the control of her husband notwithstanding her coverture, and shall not be taken in execution for his debts: *Provided, however*, That the property of the female shall remain in the care and management of her husband.

"3. Married women may hereafter become seized or possessed of real and personal property during coverture by bequest, demise, gift, purchase, or distribution, sub-

ject, however, to the restrictions, limitations, and provisions contained in the foregoing section."

Bush's Florida Digest, 1872, p. 580, act March 6, 1845.

"All property, both real and personal, of the wife, owned by her before marriage or acquired afterwards by gift, devise, descent, or purchase shall be her separate property, and not liable for the debts of her husband."

Constitution of Florida, Art. IV, Sec. 26, *ibid*, p. 581.

These laws destroy the husband's *estate* in the wife's land. Under the former act he was merely a bailiff, not an owner, and even this relationship to the land seems to have been abolished by the Constitution. If the husband had no interest in the land he was not a necessary, if indeed, a proper party.

3d. Mary F. Wilson and D. Appleton & Co. are citizens of New York (pp. 24, 45). If the contention is correct (which is denied) that citizenship in New York would oust the jurisdiction, this is a ground for dispensing with them as parties. (Rule 47 in Equity.)

III. It is argued that a claim of paramount title cannot be adjudicated in a foreclosure suit.

As regards the tax title, the jurisdiction to set it aside in such a suit is asserted in the case of Hefner *v.* Northwestern Mutual Life Insurance Company, 123 U. S., 747. It was there held that where the whole title to the land was in the mortgagor, at the date of the mortgage, and the title under the tax deed, if valid, was subsequent in time, although paramount in right, to the title acquired under the mortgage and under the decree of foreclosure, it was within the jurisdiction and authority of the Court, upon a bill in equity for the foreclosure of the mortgage,

to determine the validity or invalidity of the tax title; and the owner of such title was a proper, if not a necessary, party to the bill.

To the same effect are—

Mendenhall *v.* Hall, 134 U. S., 559.
Bradley *v.* Parkhurst, 20 Kansas, 462.

It has been shown that the alleged title of Mrs. Davis in the other moiety of the land is only equitable. It is, therefore, exclusively cognizable in equity.

The case of Dial *v.* Reynolds, 96 U. S., 340, which is earlier than the above-cited cases, is not in conflict with them. The title there set up was one which raised only a question of legal right. A demurrer had also been interposed to the joinder of it in that action.

In Peters *v.* Bowman, 98 U. S., 56, the report does not make clear what the defense of Peters was. He claimed under the mortgagor, and seems also to have set up an adverse title in some one else. The case does not appear to have been at all like that cited or the present one.

V. The sixth, seventh, and eighth assignments relate to matters of practice.

Generally speaking, matters of practice in inferior Courts do not constitute subjects upon which error can be assigned in the appellate Court.

Parson *v.* Bedford, 3 Pet., 433.
Wiggins *v.* Gray, 24 How., 303.
Barton *v.* Forsyth, 5 Wall., 190.
Bank of United States *v.* White, 8 Pet., 262.

The fact which is essential to the validity of the sale cannot be denied, viz., that it was the act of the Court. It was ordered by the Court, and it was made as respects advertisement, time, place, and seller in accordance with the orders of the Court. It was absolutely confirmed by the Court.

The person actually selling, who was the marshal (v. p. 80) was the agent or hand of the Court, and the advertisement was the advertisement of the Court. It could at will change the former. It did not matter in whose name the latter was made. At most, it can only be alleged that irregularity occurred to these particulars and they were cured by confirmation.

The law applicable to this subject is thus stated in a book of authority:

"The authorities all concur that judicial sales are sales by the Court. It matters not to the contrary that it is made through the instrumentality of a master, commissioner, or other functionary appointed thereto by the Court; it is not valid or binding, and confers no right to the property sought to be sold until confirmed by the Court. By such confirmation it is judicially made the act of the Court, and is therefore a judicial sale. The master or commissioner in conducting it acts by authority of and as the instrument or agent of the Court. In the language of the Court in Bozza *v.* Rowe, 30 Ill., 138, 'the master is the mere instrument of the Court, acts under its directions, and is subject to its control, and his acts, under the decree when regular, are considered those of the chancellor.'" * * *

Rorer Judicial Sales, ed. 1878, sec. 1.

"Confirmation is the judicial sanction of the Court. Until then the bargain is incomplete. When made it relates back to the time of sale and supplies all defects except those founded in defect of jurisdiction or in fraud."

Ibid., sec. 106.

Cockey *v.* Cole, 28 Md., 276.

Koehler *v.* Ball, 2 Kan., 169.

Williamson *v.* Berry, 8 How., 546.

"The Court is clothed with an unlimited discretion to confirm a judicial sale or not, as may seem just and wise." * * *

Sec. 108.

The sale was evidently made as directed by the decree, viz., of an undivided half. It was so understood to be by defendant's solicitors (p. 80, fol. 165, par. 4th). The confirmation was by plain intendment of such a sale—nothing more than an undivided half to claimant.

It is submitted that on the whole record the decree should be affirmed.

JAMES LOWNDES,
Attorney for Appellees.

Laws of Florida, Chap. 138.—Revenue and Taxation. Bush's Digest.

All property real and personal in this State not hereby expressly exempt therefrom shall be subject to taxation in the manner provided by law.

Sec. 1, p. 641.

The term parcel of real property and parcel of land, whenever used in the act, shall each be held to mean contiguous quantities of land in the possession of, owned by, or recorded as the property of the same claimants, person, or company.

Sec. 5, p. 642.

Between the first day of March and the first day of June in each year, the assessor in each county shall ascertain, by diligent inquiry, the names of all the taxable persons in his county, and also all their taxable personal property and all taxable real estate therein on the 1st day of March of such year, and shall make out an assessment roll of all such taxable property and appraise the same as hereinafter specified.

Ibid., Sec. 14, p. 644.

If the land assessed be less or other than a subdivision, according to the United States survey, unless the same is divided into lots or blocks, so that it can thereby be definitely described, it shall be described by the boundaries thereof or in such other manner as to make the description as definite as may be.

Sec. 17, p. 644.

It shall be the duty of the clerk of each county, immediately upon ascertaining the amount to be raised for county, school, and State purposes, to calculate and carry

out the several amounts set down as the valuation of real and personal property the respective sums assessed as taxes thereon in dollars and cents. * * *

Ibid., Sec. 34, p. 647.

On the day designated in the notice of sale the county treasurer shall commence the sale of those lands on which the taxes have not been paid as aforesaid, and shall continue the sale from day to day until so much of each parcel thereof shall be sold as shall be sufficient to pay the taxes, costs, and charges thereon, and in case there are no bidders the whole tract shall be bid off by the county treasurer for the use of the county.

Ibid., Sec. 59, p. 652.

The land shall be struck off to such persons who will pay the tax, costs, and charges for the least number of acres of land, and the portion thereof sold shall be taken from the southeast corner of such parcel in a square form, or as near as may be.

Ibid., Sec. 60, p. 652.

Office Supreme Court U. S.
FILED.
APR 26 1889
JAMES. H. McKENNEY.
CLERK.

IN THE

Supreme Court of the United States.

October Term 1888.

JAMES C. ANDERSON, Administrator of EDWARD J. WILSON, deceased, THOMAS E. WILSON, and SARAH J. DAVIS, Appellants,
vs.
JAMES S. WATT, Executor of JAMES SYMINGTON, deceased, Appellee.

No. 740.

Appeal from the Circuit Court of the United States for the Northern District of Florida.

Brief for Appellants on Motion of Appellee to Dismiss.

The record has not been printed, and the appellants respectfully ask that the further consideration of this motion be postponed until the case is heard on its merits, under the rule announced in *National Bank* v. *Insurance Company* (100 U. S., 43) where the Court said:

"The further consideration of this motion is postponed until the case is heard on its merits. The record has not been printed, and counsel do not agree as to what it contains. We will not decide motions to dismiss before the record is printed, when there is any question about the facts on which the motion rests. In order to get a decision before printing, the motion papers must present the case in a way which will enable us to act understandingly without referring to the transcript on file."

This rule was followed in *Waterville* v. *Van Slyke* (115 U. S., 290) and has been applied in many other cases.

The appellants do not agree to the interpretation of the record in this case, in the brief for the appellee, nor do they consent to submit the motion to the Court upon the statements and conclusions in that brief.

Certainly, it is apparent, upon the face of the motion papers, that the Court cannot act understandingly or justly upon the motion, and the question presented, without examining the transcript on file in the case.

If the Courts should conclude, however, to consider the present motion before the record is printed, we submit, as the result of our examination of the transcript, the following statement and observations.

Statement.

The appellants here were defendants below to a bill filed, in 1885, by the appellee and another, as executors of James Symington, to foreclose a mortgage upon 143 acres of land, cultivated as an orange plantation, in Orange county, Florida, executed, in 1875, by Edward J. Wilson, purporting to be the owner of the property, to James Symington, as security for an indebtedness by him to Symington of $13,000.

James C. Anderson and Thomas E. Wilson filed a demurrer, and Sarah J. Davis a plea, to the bill.

The demurrer was overruled, and the defendants were required to answer the bill.

The answers averred, and maintained, in substance, that Thomas E. Wilson became the owner, by conveyance from Edward J. Wilson, in 1871, of an undivided moiety of the land, and afterwards acquired the absolute title of the whole tract free and discharged of the mortgage in suit; that Thomas E. Wilson sold and conveyed the property to Sarah J. Davis, in 1879, for the considera-

tion of $8,000, receiving $2,000 in cash, and taking a purchase money mortgage on the property for $6,000; that Thomas E. Wilson assigned an interest in his purchase money mortgage to Mary F. Wilson as security for sums amounting to $4,000 advanced by her, in cash, to him; that Sarah J. Davis and her husband, in 1884, gave a second mortgage on the property to D. Appleton & Co., of New York, for the sum of $15,000; that the mortgage in suit from Edward J. Wilson to James Symington, was not a valid lien upon the land; and that the land was not liable to be sold, as prayed, for the debt mentioned in the latter mortgage.

The answers also showed the amounts of money which had been expended, from time to time, by Thomas E. Wilson, and Sarah J. Davis, in the care and cultivation of the land, for the purpose of bringing it forward to that state of development necessary to make it profitable, and in the making and erection of substantial and valuable improvements upon the property.

The proofs, adduced by defendants in support of their answers, show clearly and conclusively, as we think, that the whole property was worth, at least, $30,000, and that the value of an undivided half was not less than $15,000.

On January 19, 1887, the Court entered a decree of foreclosure and sale, adjudging that James C. Anderson, as administrator of Edward J. Wilson, was indebted to complainant, James S. Watt, as sole executor of James Symington, in the sum of $13,000, principal, and $10,887.13, interest, making in all $23,887.13, and that as security for such debt the complainant held a mortgage lien upon an undivided half interest in the lands described in the bill; and decreeing a sale of that interest, by John S. Driggs as Special Master, unless the above amount should be paid to complainant before the day of sale.

On March 7th, 1887, a sale was made, as appears, not by the person named in the decree as Special Master for that purpose, but by the Marshal, purporting to act as Master, who reported a purchase of the property by James S. Watt, the complainant, for $3,000.

The defendants objected to the confirmation of the sale, and filed exceptions to the report of sale, upon the ground that the Marshal had no authority, as Special Master, to sell the property, and, also, that the sale, if confirmed, as reported, would authorize a deed to the purchaser of one-half of the improvements upon the property, which was not intended by the decree of sale.

On April 12th, 1887, the Court entered a decree overruling the defendants' exceptions to the report of sale, and confirming and approving this sale in all respects.

The defendants appealed from the above decrees.

Points of Argument.

I.

It has been decided, by this Court, that the matter in controversy, in a foreclosure suit, is the mortgage debt claimed in the bill, and that its jurisdiction does not depend upon the value of the mortgaged property.

This was ruled in *Bank of Alexandria* v. *Hooff* (7 Pet., 170), which was a bill for the sale of a lot bound by a deed of trust to secure a sum less than $1,000. The bill was dismissed, and the complainant appealed. The defendants moved to dismiss, because the matter in controversy did not amount to $1,000. The complainant and appellant alleged, "in support of the jurisdiction of this Court, that the real question is, whether the debtor be entitled to the lot, and as that is worth more than $1,000, this Court may take jurisdiction, though the

sum claimed in the bill is less." But Chief-Justice Marshall said:

"The Court is of a different opinion. The real controversy is the debt claimed in the bill; *and, though the title of the lot may be inquired into incidentally, it does not constitute the object of the suit.*"

The defendants here denied that there was a valid mortgage lien upon this property for the debt referred to in the bill, and the right of the complainant to foreclose such lien, if one existed, by a sale of the property, as prayed.

The controversy, therefore, related to the alleged mortgage debt, and the right of the complainant to foreclose the lien asserted by the bill, by a sale of the property.

The Court overruled the defenses, and declared that there was due to complainant the amount mentioned in the decree, and that he held a mortgage lien upon the property for that amount, which he was entitled to have foreclosed by a sale, as prayed in the bill.

The mortgage debt claimed in the bill, therefore, is the matter in controversy in the suit, and not the land from which the complainant was decreed the right to collect that debt.

As this Court said, in *Elgin* v. *Marshall* (106 U. S., 581), "it is not the *actual value* of the judgment sought to be reviewed which confers jurisdiction, otherwise it might be required to hear evidence that it could not be collected; but it is the nominal, or apparent, sum or value of the subject-matter of the judgment."

We suppose this Court has never allowed extrinsic evidence to be introduced, in a foreclosure suit, where the mortgage debt, ascertained by the final decree, exceeded the jurisdictional sum, to prove that the value of the mortgaged property was not sufficient to pay the amount for which it was ordered to be sold.

That the mortgage debt is the matter in controversy in a foreclosure suit, within the meaning of the statute, clearly appears from the elaborate discussion in the opinion delivered by Mr. Justice Matthews, in *R. R. Co.* v. *Fosdick* (107 U. S., 71), where it is shown that the correct finding of the mortgage debt is indispensable to any valid sale of the property, and that any substantial error in that finding necessarily vitiates, on appeal, all subsequent proceedings in the case; "for, as it is an illegal exaction, made as a condition for preserving the rights of the mortgagor in his estate, and, if executed, depriving him wrongfully of them, it propagates itself through all subsequent stages of the cause."

II.

If the contention of the appellee, that the undivided half interest in the property is the matter here in dispute, should be approved by the Court, we submit that it clearly appears, on the face of the record, that the value of that interest exceeds the jurisdictional amount.

The theory of the appellee, apparently, that there must be a dismissal here for want of express averments in the pleadings that the value exceeds $5,000, is without the support of any authority.

All that is necessary, we apprehend, is that the Court should be satisfied from the evidence, in the record, that the value is sufficient to give it jurisdiction.

The Court said, in *Gray* v. *Blanchard* (97 U. S., 565): "We hear the case upon the record which is sent up, and if, *taking the whole record together*, it appears that we have no jurisdiction, the case must be dismissed."

This, of course, implies that if, "taking the whole record together," it appears that the value of the "matter in dispute" is greater than the jurisdictional amount, the case will be retained.

The rule was recognized in *U. S.* v. *Hughes*, (11 How., 552,) where the title to land was involved, and the jurisdiction of the court was sustained upon an exhibit, found in the record, which stated that $2,000 had been paid for the property. "There being a sugar plantation on it," the Court said, "we *assume* its value to be quite equal now."

In the present case, an examination of the record will show that this property, owing to the care and money bestowed in its cultivation and improvement, steadily increased in value from the time of its first purchase; that, in 1871, Edward J. Wilson conveyed an undivided moiety of the land to Thomas E. Wilson for $1,250; that, in 1879, Thomas E. Wilson sold the property to Sarah J. Davis for $8,000, receiving $2,000, cash, and a mortgage for the balance of the purchase money; that, in January, 1884, Mrs. Davis was able to place a second mortgage on the property for $15,000; that while it was in the hands of Thomas E. Wilson, he expended sums, amounting to $6,000, in improvements; that from October, 1879, to January 1, 1884, Mrs. Davis expended more than $20,000 in additional improvements, among them being a residence which cost $7,900; and that between January 1, 1884, and the time of filing her answer, in the autumn of 1885, she spent the further sum of $3,000 for the benefit and in the development of the property.

The moneys expended by Thomas E. Wilson and Mrs. Davis, prior to the institution of the suit, in improvements, thus amounted to $29,000, the dwelling house alone, constructed by Mrs. Davis, costing nearly $10,000.

It is a just and fair inference from these facts, that the value of the property was not less than $30,000, at the time of the institution of the suit; and as the whole history of the property shows that it steadily increased in value, in the hands of its proprietors, it must be as-

sumed that it was worth the above sum, at least, at the time of the present decrees.

The amount for which the moiety was struck off to the appellee, at the sale, under the decree, cannot be accepted as a proper criterion, or test, of the value of the property, as will clearly appear upon an examination of the record of the proceedings.

It must have been understood by every one having any knowledge of the record, in the case, that it was entirely uncertain, what the so-called Master was selling, or had the right to sell, and what his deed would convey, and, indeed, whether he had any lawful right or authority to sell or convey anything, under the decree in the case.

It will be maintained, at the hearing, that the Marshal, who acted as Master, under a telegram, apparently, from the District Judge, had no power or authority to make any sale at all of this property under the decree found in the record.

III.

The defendants below, appellants here, were all not only proper but *necessary* parties to the bill, in this case, under the rules of chancery law, and the decrees were, as respects their rights and interests in the property, joint decrees, and they had not only the right, but were required to join in the appeal, under the doctrine of this Court as stated in *Masterson* v. *Herndon* (10 Wall., 416).

The appellant, Thomas E. Wilson, who had conveyed the property to Sarah J. Davis by warranty deed, and

received a purchase-money mortgage on the property, from her and her husband, as has been mentioned, of course, was a necessary party to the suit, and had an immediate interest in the decree, and was entitled to appeal therefrom to this Court.

The statement, in the present motion to dismiss, that there is no decree against him, is unintelligible.

The bill sought relief, expressly, against him, as well as the other defendants, and the complainant obtained, by the decree, the relief asked against him and his co-defendants.

The decree established the mortgage in suit as a prior and paramount lien upon the property, as against the rights asserted by him in the property, and decreed its sale for the payment of the mortgage debt claimed in the bill.

This is a decree against Thomas E. Wilson, as well as the other defendants, in conformity with the prayer for relief in the bill, and he is entitled, with his co-defendants, to be heard by the Court upon the questions presented by the appeal.

The appellant, James C. Anderson, administrator of the mortgagor, Edward J. Wilson, as a party to the bill and the decrees below, not only had the right of appeal, but was a necessary party to the appeal, and he is entitled to be heard upon the merits of the case.

Whether or not there was any ground for the appeal can only be determined on the hearing of the case.

The matter in dispute, and the subject of the controversy in the case, as stated, related to the mortgage debt, alleged in the bill, and its existence as a valid lien on this property, and its enforceability as such, at the suit of the complainant, by a sale of the property.